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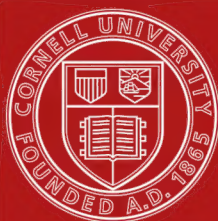
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A TREATISE
ON THE
LAW OF FIRE INSURANCE

WITH A PHILOSOPHICAL AND ANALYTICAL
DISCUSSION OF LEADING CASES

BY D. OSTRANDER

SECOND EDITION.
REVISED AND ENLARGED

ST. PAUL, MINN.
WEST PUBLISHING CO.

1897

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BY
D. OSTRANDER.

To Henry E. Southwell, Esq.,

My Dear Sir:

Our acquaintance reaches back many years, to a time when both you and I were looking forward into life with the uncertainty which boys usually experience who realize that their own unskilled energies are to be brought into competition with those who have gained strength and discipline in many successful contests. Without demonstration, we have found a mutual esteem and companionship; and, while walking apart, our paths have often converged,—crossed and then separated again. There have been greetings and clasping of hands, after which each has passed on his different way. Friends we were, and are, yet always free. On your judgment and business sagacity I have leaned; in your unselfish friendship I have trusted. The dedication of this book, the fruit of tired hours, I beg to offer you in recognition of many services unsought; of a relationship unspoken. Of the value of what I have here accomplished, I leave with diffidence to the judgment of those for whose use my work is intended; but, such as it is, I bring as a tribute to a friendship long continued,—one without a broken or cracked link.

Yours, sincerely,

D. OSTRANDER.

Chicago, January 1, 1892.

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PREFACE.

A policy of insurance is so unlike the ordinary contract in some of its provisions, being less specific and definite, that contention frequently arises concerning its interpretation, when the unexpected and unprovided for happens. The purpose of this book is to present in a familiar manner the more complicated and less understood questions which in the construction of the insurance contract will sometimes call for consideration, with such illustration of legal rules and principles as may be afforded by a large number of instructive cases that have been carefully analyzed and decided by the English and American courts. Especial attention has been given to pointing out, for the better understanding of those who, from want of time and opportunity, have been unable to familiarize themselves with this branch of the law and this class of contracts, the use of certain important conditions found in all insurance policies, which are the cause of dispute and litigation under a great variety of unlooked for contingencies. That obscurity should often exist, and construction become necessary, ought, perhaps, to be expected, from the fact that an insurance policy is never prepared in reference to any particular case. The printed stipulations and conditions are general in their character, and unless qualified by the agreement of parties, expressed in writing, the intention to insure may be, in many instances, in part or even wholly defeated. As forfeitures are often the occasion of hardship and injustice, and always repugnant to the law, it may be expected that the courts will enforce the contract whenever it is possible to do so without violence to its clearly-expressed language, and consistently with the ascertained intention of the parties; hence it will frequently occur that they will be called upon to consider a general provision in reference to the circumstances of a particular case. In their interpretations, the courts in such instances are without any infallible rule to guide them, and necessarily often

differ in their judgment of the law, and thus there has come to exist a good deal of conflict among authorities. In the preparation of this book, the writer has had in view the importance of carefully distinguishing cases, in reference to local laws, as well as to the particular language of the contract in each instance presented for construction; and, above all, he has faithfully endeavored to set forth and illustrate the legal principles applicable to such classes of cases as are more frequently found to be the subject of contention.

To those who look to the underwriter for indemnity against loss by fire, the author indulges the hope that this book will be found of especial value, as, with much painstaking, there have been pointed out the rocks on which their confidence of protection may be wrecked. The "policy" is primarily for the benefit of the property owner. The interests of all others are only incidental. To him it is of the highest importance that he understand that the contract is one of mutual covenants; that there is something for both parties to perform; that his duty is not ended with the payment of the premium. In a clear understanding of all these duties, the policy holder will find his greatest security.

Realizing that many lawyers and others, nonprofessional business men, who may frequently have occasion to consult a treatise on the subject of fire insurance law, have only limited opportunity to refer to libraries for the purpose of examining authorities cited, the author has endeavored to relieve their embarrassment, so far as possible, by incorporating into the pages of his book as much of the text of leading cases as will enable the reader to understand intelligently the principles of law relating to each particular case under discussion. If this treatise, offered now with diffidence to the public, shall be useful in relieving the courts of litigation, by reason of a better understanding of the rights of parties to the fire insurance contract, the writer will enjoy the satisfaction of having rendered a service to his fellows, and in this be amply repaid for his toil.

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FIRE INSURANCE.

INTRODUCTION.

Any person under the common law not disqualified to make contracts may insure. In the early periods of the business, these ventures were wholly confined to the limited operations of individual underwriters. The undertakings were generally small, and related to hazards with which the underwriter was personally familiar. The contracts were by parol, and embraced only such matters as descriptions of the subject to be insured, the voyage, and the amount of premium. Experience demonstrated the importance of having many contingencies that were likely to arise definitely provided for, that at first had not been clearly understood, and for which the simple parol agreement proved unsuited and inadequate. Thus, out of the varied circumstances and growing necessities of the business was, in the process of time, evolved the insurance policy. We can understand that the individual underwriters afforded but meager facilities for the general public to obtain indemnity. Their ventures were few, and at first appear to have been mainly intended to protect and foster enterprises which for personal reasons the underwriters desired to encourage. The utility of insurance was, however, early recognized, and its benefits gradually extended until large aggregations of capital were required to afford the security demanded. Thus it was that corporations came to take the place of the personal capitalist, the merchant, or banker, under whose protection ships were to sail the seas, and perhaps, in rare and isolated cases, the owners of valuable property on shore were to be insured against loss.

With the agency system, which is of comparatively recent origin, the business became localized wherever there was property to insure, and competent persons could be found to attend to the simple yet responsible duties of inspecting risks and making contracts of insurance. The advantage growing out of this departure, the establishing

of an agency system, consists in the better facilities offered to property owners to procure insurance through an immediate and responsible representative of a distant corporation,—a person who is always accessible, and with whom persons seeking insurance can negotiate with freedom, and without delay and expense. The disadvantages relate largely to the increased moral hazard which has come to exist on account of the local business being sometimes intrusted to dishonest and incompetent agents, through whose fraud or negligence the watchful and enterprising incendiary finds an opportunity to make the insurer the victim of his greed and crime. With the planting of agencies at every business center, the insurance company has found it necessary, for its own protection and the protection of the general public, to incorporate into its policy many provisions that were before unknown. These are intended mainly to secure, on penalty of forfeiture, the fullest disclosures of all important facts in regard to the condition and circumstances of the property insured, and to prohibit changes that will lessen the interest of the insured in maintaining the most efficient watchfulness for its security, or that will create a motive for its destruction. The purpose of these promissory and restrictive provisions is obviously to secure the largest possible measure of good faith on the part of the insured, and thereby save the insurer from loss through “fraud and evil practice,” and incidentally to save society from the injury it would suffer from a constant menace to the integrity of its members, on account of removing the chief impediments to crime, and by offering a reward for evil doing. Than the underwriter, there is no class of men who have a larger interest in maintaining the public conscience and the highest sense of business probity. For a long period insurance was confined to marine risks, and, when the business was extended to the protection of property owners against loss by fire, it was in opposition to much prejudice on the part of the general public, because of the popular belief that it would increase crime, and cause even honest people to relax in the watchful care which every property owner should exercise to prevent accidents from fire. This expectation has been realized to a degree that suggests a doubt whether, in the interests of property and morality, the business of insurance should not be so regulated by statutory law as to prevent insuring in such an amount that the insured will no longer have a

substantial interest in protecting the subject from loss. The destruction by fire of property to the value of more than a hundred million of dollars annually in the United States alone is a serious waste, and presents an important problem for the consideration of the economist. Notwithstanding the better facilities provided for extinguishing fires, the work of destruction goes on year after year, involving homes, warehouses, factories, and valuable merchandise, representing comfort and competency for many thousands of people. But this loss of property is not the worst aspect in which this problem is presented. Fraudulent carelessness and intentional crime have come to be a large element in the cause of this destruction. In this fact is involved the corruption of public morals, and a weakened sentiment of respect for the law. A business that continually offers a temptation for the commission of crime will inevitably produce its disastrous effects on the public conscience; and society, for its own preservation, must sooner or later bring it under statutory regulations.

For this condition of things the insurer is no more to be blamed than the insured. The latter demands indemnity on the basis of exaggerated valuations,—a fact which, in a large proportion of cases, is well known to him, but unknown to the company which writes the policy. Overinsurance is no less the rule among honest persons than among rogues. To obtain accurate or even approximate estimates of the value of property on which insurance is predicated would generally involve expense, such as the employment of experts, which would necessarily be added to the premium, and thereby increase the cost of the insurance. This precaution against overvaluations is therefore omitted, in the interest of the policy holder. When a loss occurs under circumstances that clearly point to incendiarism, it will seldom occur that the general public will manifest any considerable interest in finding out, and bringing to a just punishment, the guilty party. The authorities are frequently indifferent, and thus it will happen that crime is often committed with impunity, and the criminal well remunerated for his clever undertakings, who proceeds with confidence to repeat, under other circumstances, and at other places, a crime that has been attended with so much profit, and with so little difficulty and danger.

Marshall, in his treatise on Insurance, written about the begin-

ning of the present century, refers to this unpromising feature of the business (page 682), from which we quote as follows: "It cannot be denied that this species of insurance affords great comfort to individuals, and often preserves whole families from poverty and ruin; and yet it has been much doubted by wise and intelligent persons whether, in a general and national point of view, the benefits resulting from it are not more than counterbalanced by the mischief it occasions. Not to mention the carelessness and inattention which security naturally creates, every person who has any concern in any of the fire offices, or who has attended the courts of Westminster for any length of time, must own that insurance has been the original cause of many fires in London, with all their train of mischievous consequences."

The benefits of insurance at the present time, in encouraging and promoting business enterprises, are incalculable. It often establishes a basis for credit, and enables manufacturing and commerce to extend their operations to a proportion that would otherwise be impossible. Capital, which unprotected is always timid, would be withheld from such enterprises of public utility as involve more than ordinary hazards from fire, without the promise of indemnity in the event of loss. The insurance company gives confidence and stability where otherwise would exist only doubt and hesitation. The magnitude of all great business undertakings would necessarily shrink materially in their proportions without the support and encouragement given to them by the underwriter, whose office it is to strengthen the hands of industry, to steady and give a uniform and certain movement to the wheels of commerce. It stays the slings and blunts the arrows of outrageous fortune, by its system of distributing the ills of accident and chance.

It is well known that insurance companies, as a rule, perform their obligations promptly, and even with a liberality that frequently suggests more of waste than business prudence. A company having a large premium income will necessarily have numerous losses to settle and pay. It is accustomed to regard a loss as the inevitable incident of the undertakings in which it is engaged, and it is only when a succession of disastrous fires has increased the loss account above the average which has been provided for in the premiums received that any anxiety comes to exist in regard to gen-

eral results. In the adjustment of claims when there are no doubts presented concerning the good faith of the claimant, it will seldom happen, among reputable companies, that an avoidance of the contract will be urged for purely technical reasons. The insurer is accustomed to pay, in performing its obligations, under circumstances where important contract stipulations have been violated, such as would cause persons engaged in other business to decline the recognition of any duty in the matter. These liberal methods of dealing arise largely from the nature of the business. The success of the underwriter depends almost wholly upon the favor with which he is regarded by the public. The reputation that increases the premium income is secured by generous and liberal treatment of his patrons in the settlement of claims, instead of parsimony and the insistence on technical rights. Pursuing, therefore, with prudent zeal, its own interests, it comes to express in the conduct of its affairs a liberality that is sometimes the subject of just criticism; departing, as it often does, from rules that have come from the crystalizing of experience in other business undertakings. Thus it is seen that the insurance company, with all the benefits it brings to society, has certain marked tendencies to weaken the public conscience, and to introduce habits and methods that are without the beams and braces that have been found in practice to be the only sure supports of successful business undertakings.

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ANALYTICAL DISCUSSION

OF THE

LAW OF FIRE INSURANCE.

CHAPTER I.**CONTRACT.**

- § 1. The Contract.
2. When Parol Evidence is Admitted to Vary the Terms of a Written Contract.
 3. The Insured will be Bound by the Statements Contained in the Application, when Written by Himself or His Agent.
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§ 30. When Suit is Brought on the Contract, it is an Election of the Remedy.

31. Construction.

32. Statutory Policies.

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§ 1. The Contract.

While the insurance contract is in most cases evidenced by the policy, it may exist wholly by parol. When this occurs, it will be generally under circumstances where the agreement of the parties contemplates the issuance of a policy, and the rights and obligations of both the insured and the insurer will be fixed by the terms of the form of contract in use by the company which is a party to the agreement. When a policy is delivered by the insurer, and accepted by the insured, the law will presume it expresses the contract as made by the parties.¹ But this presumption may be set aside, and parol

¹ "If the language employed is free from ambiguity, the writing will be enforced in accordance with its terms. If, by reason of fraud or mutual mistake, the real agreement of the parties is unexpressed, the instrument may be reformed, upon proper proofs, in a court of equity. But, as an expression of the intention of the parties, an unambiguous written agreement, when sued on in a court of law, is unalterable by oral testimony." *Martin v. Insurance Co.*, 57 N. J. Law, 623, 31 Atl. 213.

The policy, at the time of the fire, and at all times before, was in the hands of the insurer's agent; but it fully appeared that the insured could, had he so desired, have had its possession. It was held that insured must be presumed to know the contents of the policy; that, if he had not read it, he alone was in fault, and must be bound by its conditions in the same manner and to the same extent as would have been the case had the policy been in his possession. *Guinn v. Insurance Co. (Tex. Civ. App.)* 31 S. W. 566. The law presumes that the parties to a contract know its contents.

In *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 145, 69 Fed., at page 80, the court said: "There is no doubt that there are cases where one party to a written contract has been so imposed upon by the fraudulent representations of its contents, or by some artifice or deceit of the other party, which prevents him from reading it, that he may be excused for ignorance of its contents. But I cannot subscribe to the proposition that a mere statement or agreement as to the terms of the proposed contract, made in the preliminary oral negotiations which result in the subsequent written contract, will excuse either party from reading the contract when it is delivered, or will reverse the settled rule that the written contract must prevail over the preliminary negotiations. It is the duty of every party to a contract to

evidence allowed to show that when the policy refers to an application, which is made a part, and its statements agreed to be warranties, such application does not set forth the facts as they were stated by the insured; that the facts were truthfully given, but falsely and fraudulently written in the application by the company's agent. It

read it and to know its contents when he has an opportunity to examine it before he accepts it, and in the absence of fraud, concealment, or misrepresentation as to its contents he must be conclusively presumed to have knowledge of them. Contracts for insurance furnish no exception to this rule. *Morrison v. Insurance Co.*, 69 Tex. 353, 359, 6 S. W. 605; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 365, 31 N. E. 31; *Wilcox v. Insurance Co.*, 85 Wis. 193, 55 N. W. 188; *Fuller v. Insurance Co.*, 36 Wis. 599, 604; *Herbst v. Lowe*, 65 Wis. 321, 26 N. W. 751, 754; *Hankins v. Insurance Co.*, 70 Wis. 1, 2, 35 N. W. 34; *Herndon v. Triple Alliance*, 45 Mo. App. 426, 432; *Palmer v. Insurance Co.*, 31 Mo. App. 467, 472; *Southern Mut. Ins. Co. v. Yates*, 28 Grat. (Va.) 585, 593, 594; *Ryan v. Insurance Co.*, 41 Conn. 168, 172; *Barrett v. Insurance Co.*, 7 Cush. (Mass.) 175, 181; *Holmes v. Insurance Co.*, 10 Metc. (Mass.) 211, 216; *Susquehanna Mut. Fire Ins. Co. v. Swank*, 12 Ins. Law J. 625, 627; *Maine Mut. Marine Ins. Co. v. Hodgkins*, 66 Me. 109, 112, 113; *American Ins. Co. v. Neiberger*, 74 Mo. 167, 173; *Beach, Ins.* § 414, and cases cited.

Where there are no grounds for construction, contracts must be enforced as made. *Fireman's Fund Ins. Co. v. Barker* (Colo. App.) 41 Pac. 513; *Maril v. Insurance Co.*, 95 Ga. 604, 23 S. E. 463; *Bennett v. Insurance Co.*, 55 N. J. Law. 377, 27 Atl. 641.

The conditions and limitations are parts of the contract, and it is immaterial whether or not they are read by the insured. The legal effect of such conditions and limitations gains or loses nothing by the care or indifference of assured in acquainting himself with their character. The policy was delivered at the place and to the person named by the plaintiff, and he is bound by its terms, whether he read it or not, there being no facts shown which prevented him from doing so. *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. 605; *Goddard v. Insurance Co.*, 67 Tex. 71, 1 S. W. 906; *Security Life Ins. & Annuity Co. v. Gober*, 50 Ga. 404; *Cleaver v. Insurance Co.*, 71 Mich. 414, 39 N. W. 571; *Bonneville v. Assurance Co.*, 68 Wis. 298, 32 N. W. 34; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Susquehanna Mut. Fire Ins. Co. v. Swank*, 102 Pa. St. 17. The fact that the plaintiff did not know the contents of the policy will not relieve him from the binding force of the warranty contained in it. He could have read it if he had desired to do so. If, however, the insurer knew of the existence of the incumbrance at the time, courts will hold it to have been waived. It will not be presumed that the party making the contract intended to perpetrate a fraud by putting in a condition which he knew would prevent it from

may be shown, too, by parol, that facts that are set up in avoidance of the policy were known to the company at the time of the inception of the contract. When this is done the principle of estoppel will apply. The authorities in support of both these propositions are very numerous.²

§ 2. When Parol Evidence is Admitted to Vary the Terms of a Written Contract.

The rule of law is that the evidence of a contract cannot exist partly in parol and partly in writing. It is also a rule of law that parol testimony cannot be admitted to vary the terms of a written contract. While these rules express the "conscience of the law," which an eminent jurist has aptly said "is safer to follow than the

taking effect. *Liverpool & L. & G. Ins. Co. v. Ende*, 65 Tex. 123; *Aetna Ins. Co. v. Holcomb* (Tex. Sup.) 34 S. W. 915; *Quinlan v. Insurance Co.*, 31 N. E. 31, 133 N. Y. 356; *Thomson v. Insurance Co.*, 90 Ga. 78, 15 S. E. 652; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

Insured charged with knowledge of the conditions of policy. Principles of law applicable ably discussed by Justice Grant, of Michigan court. *Wierengo v. Insurance Co.*, 57 N. W. 833, 98 Mich. 621.

The insurance was on seven steam boilers. Afterwards two more were purchased, and placed contiguous to those in position when the policy was written. Held, that the conversation between the plaintiff and the insurance company's inspector did not extend the insurance to cover the boilers subsequently purchased. *Laclede Fire-Brick Manuf'g Co. v. Hartford Steam-Boiler Inspection & Ins. Co.*, 9 C. C. A. 1, 60 Fed. 351.

Courts may interpret, but cannot change, contracts. A very carefully considered discussion of the reciprocal rights of contracting parties. *Dover Glass-Works Co. v. American Fire Ins. Co.* (Del. Err. & App.) 29 Atl. 1039.

When insured accepts policy with knowledge of its terms, it will be held to embody the agreement of the parties. *Edwards v. Insurance Co.*, 60 N. W. 782, 88 Wis. 450.

While parol evidence of contemporaneous agreements cannot be produced, to change the written instrument, it is competent to show oral agreements that are only collateral. *Platt v. Insurance Co.*, 153 Ill. 113, 38 N. E. 580.

When policy is in possession of insured, knowledge of its contents will be presumed. *Syndicate Ins. Co. v. Bohn*, 12 C. C. A. 531, 65 Fed. 165.

² *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Goit v. Insurance Co.*, 25 Barb. (N. Y.) 189; *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217; *Clark v. Insurance Co.*, 8 How. (U. S.) 235.

conscience of any person, no matter however wise and virtuous he may be," there have been in many recently adjudicated cases clear departures from both the letter and spirit of these long-established and conservative rules. Thus, a person seeking insurance on his mill, knowing that the risk will not be accepted unless a watchman is kept on the premises, states in his application that a watchman is employed to guard the property during the nighttime. This answer is written in the application, and signed by the insured. The application, by its own terms, and by special reference in the policy, is made a warranty, and a part of the contract; but on the occurrence of a fire it is ascertained that at the time the application was made, and subsequently, no watchman was kept. Here, then, is a clear breach of the warranty; and, by the express terms of the policy, the company is relieved from the payment of the loss. But the courts will allow the insured to testify that he stated to the agent who filled up the application "that there was no watchman," and that he signed the application without reading it. Thus the integrity of the application is impeached, and the insurer deprived of a very essential provision of its contract.³

³ The evidence tended to show that, when the contract of insurance was made, it was explained to the agent of defendant by plaintiff that he intended to place a mortgage on the property covered, and that such proposal was then assented to. Held, that the insurer was estopped from pleading as a defense the incumbrance subsequently placed on the property. *Hardwick v. Insurance Co.*, 26 Pac. 840, 20 Or. 547.

The application, which untruthfully stated the incumbrance, was prepared by the insurer's agent, who, as attorney for the insured, had been made acquainted with the facts concerning the incumbrance. It was held that the knowledge and fraud of its agent estopped the insurer from pleading the incumbrance as a defense. *Beebe v. Insurance Co.*, 53 N. W. 818, 93 Mich. 514; *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13, 26 S. W. 763; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Parsons v. Insurance Co.* (Mo. Sup.) 31 S. W. 117.

When, at inception of the insurance, the agent of the company had knowledge of facts that constituted a forfeiture under the terms of the policy, it will be deemed to have been the intention of the insurer to waive such conditions as were inconsistent with the facts disclosed or understood. *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 926; *Queen Ins. Co. v. Kline* (Ky.) 32 S. W. 214; *McKinney v. Insurance Soc.*, 89 Wis. 653, 62 N. W. 413; *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475; *Hartford Fire Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. 685.

So, too, where no application in writing is taken, but it is a condition of the policy that, if the property be incumbered, it must be so represented to the company, and the fact indorsed on the policy, and after a loss it is discovered for the first time that the property was incumbered at the time the policy was written and delivered. It will be seen that there is a very strong temptation placed before the insured to defeat the forfeiture by testifying that he informed the agent of the company of the incumbrance when negotiating the insurance. Cases of this kind are of frequent occurrence, and clearly demonstrate the danger of admitting parol testimony to change and practically nullify a written contract, whether such change and nullification be called "estoppel," or something else equally significant of substitution and evasion. Hardships will sometimes occur, frauds will sometimes be perpetrated, under a strict application of the general rule stated, which has been formulated by the best wisdom of the courts, and tested by the experience of generations of jurists. But will not greater hardships and worse abuses result from its abandonment? Does not this substituting of secondary evidence for that of the highest character mark a dangerous departure from a time-honored and conservative rule for establishing the verity of facts that form the basis of written instruments?

§ 3. The Insured will be Bound by the Statements Contained in the Application, When Written by Himself or His Agent.

The authorities have differed a good deal in respect to this question. While generally holding that the insured may dispute the genuineness of statements contained in the application when written therein by the agent of the company, although signed by himself, the case is otherwise when the application is filled up by the insured or his agent.⁴ And so, too, when the policy is made and accepted by the insured, expressing upon its face the condition or warranty, the insured will be bound. This last proposition must, however, be un-

⁴ The application had been signed for the insured by another, without the insured's authority, who, on being informed, ratified the act by accepting the policy. Held, that the insured must be bound by the application, in the same manner and to the same extent as he would had he signed the ap-

derstood as subject to important modifications as respects conditions existing at the date of the policy, as explained in previous paragraph.

§ 4. Contract not Complete unless the Minds of the Parties have Met.

Where there has been no agreement between the parties as regards all essential matters, the contract is incomplete, and cannot be enforced;⁵ but where the minds of the insured and insurer have

plication with his own hand. *Phoenix Assur. Co. v. Coffman* (Tex. Civ. App.) 32 S. W. 810.

In *Denny v. Insurance Co.*, 13 Gray (Mass.) 497, the preliminary paper is referred to as a "survey." It expressed an agreement, which was made a warranty, that the insured should keep a watchman. The "survey" having been signed by a third person, without express authority, and the agreement in regard to watchmen being executory, the Massachusetts court was of the opinion that it could not be enforced. It said: "Admitting the soundness and force of this agreement, and that plaintiff is bound by the survey, so far as he has recognized and adopted it by accepting the policy, the question still remains to be determined, to what extent such recognition and adoption go. And the answer to this question depends upon the proper and legitimate meaning of the word 'survey,' because it was of this, and this only, that the plaintiff had notice by the terms of his policy. * * * So far as they are of an executory nature, or relate to the use or occupation of the premises subsequent to the date of the policy, it is clear that the plaintiff is not bound by them." *Schmidt v. Insurance Co.*, 41 Ill. 295; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Ashworth v. Insurance Co.*, 112 Mass. 422; *Insurance Co. v. Lyman*, 15 Wall. 664, 670; *Alston v. Insurance Co.*, 4 Hill (N. Y.) 329.

⁵ The solicitor who took the application had no authority to issue policies, or otherwise to bind the insurer by a completed contract of insurance. The application was received at the office of the company March 10th. Policy was written, and returned to the soliciting agent three days later, and was in his hands when the fire occurred, March 16th. The application requested insurance against both fire and tornado, and in different sums, particularly designated. The policy, as written by the company and mailed to its agent, did not conform with the application, in the fact that the tornado insurance did not cover all the subjects requested. As the policy written differed in an essential particular from the application, and had not been accepted before the fire, it was held that there had been no meeting of the minds of the parties, and that the company was not liable for the loss. *Stephens v. Insurance Co.*, 87 Iowa, 283, 54 N. W. 139.

The P. Co. had carried the risk for one year, and (without being asked

met, and the policy, as written, does not express their mutual intention, it may be reformed by a court of equity. But this will not be done unless the evidence is so convincing as to leave no room

to do so by the insured) on the expiration of its policy forwarded to its local agent a renewal. At the time of the loss this renewal had been received, but had not been delivered to the insured. No premiums had been paid. Held, that there was no contract. *New York Lumber & Wood-Working Co. v. People's Fire Ins. Co.*, 96 Mich. 20, 55 N. W. 434.

The Michigan Pipe Company applied to one Schneck, who was an insurance agent representing several companies, requesting that he issue to said Michigan Pipe Company policies on lumber, for a sum mentioned. No particular companies were designated, nor was the rate of premium, or term of the insurance, agreed upon. For the convenience of the agent, Schneck, the policies were to be written, and the insurance to begin, on the 1st of the following month. The fire occurred on the 6th, and it was in evidence that all of the policies had been written before that time. Held, that as plaintiff had been insured for several years on the same class of property, dealing all the time with the same agent, the rate of premium and term of insurance were presumed to have been understood; that a custom had been established between the parties which rendered any special and distinct agreement in respect to these matters unnecessary; that the writing of the policies on the 2d, 3d, 4th, and 5th days of the following month, although they had not been delivered, and no premium paid, was in substantial accord with the understanding of the parties, and effectuated a valid insurance. *Michigan Pipe Co. v. North British & Mercantile Ins. Co.*, 97 Mich. 493, 56 N. W. 849; *Dove v. Insurance Co.*, 98 Mich. 122, 57 N. W. 30.

When the application has been accepted, there is an existing contract; and the parties will be bound if the premium has been paid, or payment arranged for. It is immaterial whether or not the policy has been delivered. *Dailey v. Association*, 102 Mich. 289, 57 N. W. 184; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060.

Plaintiff had been insured by the Denver Insurance Company, whose policy expired on January 9th. Neither then nor at any previous time had any request been made by plaintiff to renew the policy. Five days afterwards a fire occurred, and plaintiff immediately telephoned the resident agent of the Denver Company, asking if the insurance was continued by renewal, and the agent replied that it was. Plaintiff then sent to agent's office, and procured the policy, which was dated January 9th. When obtaining possession of the policy, nothing was said by plaintiff about the property having burned. When delivering the policy, the agent knew nothing of the fire. Plaintiff pleaded a local custom on part of St. Paul agents to renew policies unless otherwise directed. Held, that such custom would not be sufficient to bind the defendant, unless it was general and known to

for doubt as to what the intention of the parties actually was. If the evidence shows that the policy was written so as to express the

both parties. No contract. *Nippolt v. Insurance Co.*, 57 Minn. 275, 59 N. W. 191.

"When offer of contract is made by letter, and accepted in same manner, the contract is complete when the letter of acceptance is deposited in the mail." This is based on the proposition that the "post" is the agent of the one proposing the contract. In order to make contract complete, the acceptance must be identical with the terms proposed. *Hartford Steam-Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629.

Plaintiff met agent of insurer, and reminded him that his policy had expired. Agent answered that the company would not continue risk for same amount. Plaintiff then said, "Well, write policy for such sum as you think right." Nothing further was done, and a week or two later the property burned. It was held that the conversation referred to did not import an agreement between the parties to insure. *Sater v. Insurance Co. (Iowa)* 61 N. W. 209.

The agent of insurer contemplated being absent, and, before going away, so far arranged for the continuance of the policy in suit, which would expire during his absence, as to write a renewal, and make entry on his office register. At or near the time of the expiration of the policy the agent of the insured called at the office of the insurer's agent, and was shown by a boy in charge the renewal entry, and was told that the insurance was continued. Some time after the agent of the insurer returned, he was instructed by the company's manager to cancel, and thereupon returned policy to the general office, without notifying the insured of what had transpired. No premium had been paid, and it was held that there was a valid insurance. *Lum v. Insurance Co.*, 104 Mich. 397, 62 N. W. 562; *Croft v. Insurance Co.*, 40 W. Va. 508, 21 S. E. 854.

Held, in case last cited, that contract may be complete, although the selection of the company to carry the risk is left to the decision of insurer's agent.

Held, that the expression of a desire or intention to procure an insurance, or a proposition made to an insurance agent to insure property, and an assent or acceptance by the agent to insure, without further and more particular agreement, would not amount to a contract of insurance, or an agreement to insure. The subject-matter, period, rate to be paid, and amount of insurance, must be agreed upon, expressly or by implication, before there can be an absolute, binding agreement between the parties. *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Hartford Fire Ins. Co. v. King (Ala.)* 17 South. 707.

A soliciting agent, having no authority to bind his company by contract, took plaintiff's application, and told him he was insured from that moment. The court held that the soliciting agent being without authority, real or

understanding of one of the parties only, then it will be held null and void, as there had been no concurrence of purpose.

The general principle of law in regard to parol contracts is tersely

apparent, to make binding contracts, his statements to applicant were to be construed only as an expression of his personal opinion of the legal effect of what had been done. *O'Brien v. Insurance Co.*, 108 Cal. 227, 41 Pac. 298.

It is held that completion of contract "depends upon the question whether the respective parties have come to an understanding upon all the elements of the contract, so that nothing remains to be done." An agreement "to insure contemplates the delivery of the policy as the consummation of a contract." *Elliot v. Grand Lodge*, 2 Kan. App. 430, 42 Pac. 1009.

When insured had asked for policy for one year, it was written for three years. Held, that there could be no insurance without some act of the applicant signifying his acceptance of the longer period. *Phoenix Ins. Co. v. Hague* (Tex. Civ. App.) 34 S. W. 654.

Insured, under a life policy, had been permitted to pay his premium for several years at a particular bank. This bank had made an assignment, and its agency to make collection for defendant company terminated. On the day before an annual payment of premium became due, insured offered payment at the bank, and it was refused. The tender was held good. *Manhattan Life Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280.

The leading authorities in respect to when a contract is consummated are *Mutual Life Ins. Co. v. Young*, 23 Wall. (U. S.) 85, 5 Ins. Law J. 17; *Wood v. Insurance Co.*, 32 N. Y. 619, also in 5 Benn. Fire Ins. Cas. 60; *Train v. Insurance Co.*, 62 N. Y. 598, 6 Ins. Law J. 13; *Mead v. Insurance Co.*, 3 Hun (N. Y.) 608, 5 Ins. Law J. 907; *Tyler v. Insurance Co.*, 4 Rob. (N. Y.) 151; *Hughes v. Insurance Co.*, 55 N. Y. 265; *Goddard v. Insurance Co.*, 108 Mass. 56, also 2 Ins. Law J. 663; *Thayer v. Insurance Co.*, 10 Pick. (Mass.) 326; *Hartshorn v. Insurance Co.*, 15 Gray (Mass.) 240; *Continental Ins. Co. v. Jenkins*, 5 Ins. Law J. 514; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Underwriters' Agency v. Seabrook*, 49 Ga. 563, also 43 Ga. 583; *Kimball v. Insurance Co.*, 17 Fed. 625, 12 Ins. Law J. 923; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333, 4 Benn. Fire Ins. Cas. 269; *Kohne v. Insurance Co.*, 1 Wash. C. C. 93, Fed. Cas. No. 7,920; *Perkins v. Insurance Co.*, 4 Cow. (N. Y.) 645; *Sun Mut. Ins. Co. v. Wright*, 23 How. (U. S.) 412; *McCulloch v. Insurance Co.*, 1 Pick. (Mass.) 278; *Sandford v. Insurance Co.*, 11 Paige (N. Y.) 547; *Diver v. Insurance Co.*, 17 Ins. Law J. 156; *Orient Mut. Ins. Co. v. Wright*, 23 How. (U. S.) 401; *Buffum v. Insurance Co.*, 3 Allen (Mass.) 360; *Wallingford v. Insurance Co.*, 30 Mo. 46; *Patterson v. Insurance Co.*, 5 Ins. Law J. 376; *Mattoon Manufg Co. v. Oshkosh M. F. Ins. Co.*, 69 Wis. 564, 35 N. W. 12, 17 Ins. Law J. 3; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 6 Ins. Law J. 285.

and clearly stated in the case of *Angell v. Hartford Ins. Co.*⁶ The facts there may be recited as follows: The agent of the Hartford Company agreed to insure the plaintiff for \$1,000, in the term of three years, for a premium of \$30, which was to be paid when the policy was delivered. There was a delay on the part of the agent in writing the policy, and in the meantime the property burned. The plaintiff tendered the premium, and demanded that the policy agreed upon be made out and delivered to him, which was refused.

Suit was brought to enforce the parol agreement made between the plaintiff and defendant's agent. Such contract was held good, and damages awarded. Grover, J., in delivering the opinion of the court, said: "The counsel for the appellant is mistaken in supposing that the action was based upon a parol contract of insurance for three years. There was not sufficient evidence to show that Carpenter [the agent] was authorized to make such a contract for the defendant. It was alleged in the complaint, and the testimony tended to prove, that a preliminary contract was made, by which it was agreed that the defendant should insure the plaintiff upon the property, against damage by fire, for a sum and at a rate agreed upon, for the term of three years from the time of making the contract, and that the policy of insurance should shortly thereafter be made out, to take effect from that time, and to be delivered to the plaintiff by Carpenter, at which time it was agreed that the premium should be paid. It was proved that Carpenter was the agent of the defendant, with authority to negotiate contracts of insurance, agree upon the rate of premium, term of insurance, and, in short, to agree upon all the terms of the contract; that he was furnished with policies executed in blank by the president and secretary of the defendant, with authority to fill up and deliver the same to any party with whom he made a contract. This authorized him to make a preliminary contract, binding upon the defendant, to be consummated by filling up and delivering a policy pursuant thereto. The case comes directly within the principle upon which *Ellis v. Albany City Ins. Co.*⁷ was decided by this court. The question whether such an agent was authorized to bind his principal by such a contract was fully considered in that case.

⁶ 59 N. Y. 171.

⁷ 50 N. Y. 402.

The only distinction between that and the present is, in that case the premium was paid to the agent at the time of making the contract, and had been paid to the company, while in this case credit was given therefor until the policy should be delivered. This has no effect upon the validity of the contract.⁸ A recovery of the amount insured was proper, in an action for breach of contract. The private instructions given by the defendant to Carpenter, by which he was to regulate his conduct in the transaction of the business, were not known to the plaintiff or her agent, and could not, therefore, affect the rights of the parties."

§ 5. When Contract is not Complete—Usage.

The question of what was necessary to be done to complete a contract of insurance was considered by the supreme court of Illinois in *Dwinning v. Phenix Ins. Co.*⁹ The contest there arose on a bill in chancery to compel the defendant company to issue a policy of insurance in conformity with the terms of an alleged contract made by parol. From the facts stated by the court, it appears: That one Nathan Whitman, a broker, undertook to obtain for the plaintiff a considerable sum of insurance on the building known as the "Steel Block," in Chicago, a few days before the great fire in 1871. That Robert Critchell was the authorized agent of the defendant company, and that he had in his employ a clerk and inspector named Lookinland. That the broker, Whitman, had some conversation with Lookinland in reference to placing \$5,000 of the risk with the defendant. L. had examined the building to be insured, and it was claimed that W. had made with him, through his clerk, Mann, an agreement to insure. This was denied by L., who testified that the only definite understanding reached was that W. should send to Critchell's office a signed application. On the 7th day of October, between 4 and 5 o'clock in the afternoon, as L. was leaving the office, the clerk employed by W., before mentioned, handed him an application. That he stepped back into the office, and laid the application on his desk; intending to refer it to the

⁸ *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Audubon v. Insurance Co.*, 27 N. Y. 216.

⁹ 3 Ins. Law J. 677.

defendant's agent, Critchell, when a proper opportunity occurred. Mann testified that he asked L. if it was "all right" and if the "property was covered"; that affirmative answers were given to both these questions. Lookinland's evidence is in denial that he said the "property was covered," but admits that, on a hasty examination of the application, he pronounced it "all right." The court said: "The proof of contract to insure rests upon the alleged statement of Lookinland that the risk was covered. Mann testified in the affirmative on the vital question of fact; and Lookinland, in the negative. They are the only witnesses in regard to it. There is no preponderance of evidence for the plaintiff. * * * The premium, too,—an important element in the contract of insurance,—was not paid. Plaintiffs contend that there was an implied waiver of prepayment of the premium, from the course of dealings between the parties, and from an alleged general custom among insurance agents and brokers to give credit for premiums. * * * The evidence shows that there had never been any dealings between Critchell and Whitman individually, nor between Critchell and N. Whitman & Co., as the firm might have been composed in October. On Whitman's dissolving with a former partner, Critchell had directed Lookinland and the other clerks not to take any risks from him, nor give him any credits. * * * We see nothing in the general custom, or in any particular course of dealings between the parties, upon which to found an implied waiver of the prepayment of the premium, or which should have given rise to any reasonable expectation on the part of Whitman that he would be indulged with any credit for the premium. Upon the whole case, we regard that there were but the preliminaries to making a contract of insurance, and that no contract was actually made."

In dismissing the bill, it will be observed that the court considered and decided two important questions. Assuming that the clerk, Lookinland, had authority to make a binding contract, the court held that the consummation of such contract must be shown by a preponderance of testimony, and that the contest was whether Lookinland had said to the broker's clerk that the "property was covered"; and, the two clerks testifying against each other, it was the opinion of the court that the contract was not proven, that the premium was an important element in the contract, and that,

unless this had been waived, payment must be shown. A general custom in the business to give credits would not be sufficient to relieve the plaintiffs from the duty of prepayment. By a strong implication, the conclusion reached by the court was fully in support of the general principle, often affirmed, that, in matters involving trust and financial responsibility, a general custom will not be presumed to have been considered by the parties when making the contract, unless it is shown to have existed in the course of dealings between them.

§ 6. Insurance Contracts Sui Generis.

The insurance contract, in one important feature, at least, is *sui generis*,—a fact which is not always clearly understood and appreciated either by the courts or the general public.

A. buys of B. merchandise valued at \$1,000, and gives his note for that amount. A.'s duty to pay this note at maturity is obvious. The obligation is supported by a valuable consideration. A. has been permitted to appropriate for his own use or benefit a full equivalent of the money which he has promised to pay. To retain the goods, therefore, and decline payment of the note, would be an injustice to B., and an act of downright dishonesty. This is an ordinary contract, simple in its terms, with equities apparent and clearly represented in the exchange of merchandise for "a promise to pay," between the parties. Now, mark the distinction between the elemental principles of a contract of this kind, and one of insurance.

C. procures of the D. Co. a policy for \$1,000, and pays a premium of \$10, and on the happening of certain contingencies the D. Co. will be liable to pay C. the amount written in the policy; the difference between the premium and the contingent liability of the company (\$990) representing the value of the chances that the property insured will not burn within the terms of the policy. It is clear, therefore, that anything which affects these chances either diminishes or increases the consideration that sustains the obligation into which the company has entered, and every condition of the policy intended to increase the vigilance of the insured in watching and protecting the property lessens the hazard, and thereby contributes to the "balancing of equities" between C. and the D. Co.

It is easy to understand that the obligation to pay a loss does not rest alone on the receipt by the company of a few dollars in premiums, and when presenting a claim should C. say to D., as it frequently occurs, "You have taken my money, now come forward as an honest company should, and satisfy my demands for indemnity," D. might with much propriety answer: "That was not the compact between us. It is true you gave me in cash one per cent. of the sum you demand in settlement of your claim, but you promised as well other things which you have not performed. Our contract is one of mutual covenants, and of those to be performed on your part the payment of the agreed premium is not by any means the most important." All the conditions of an insurance policy in regard to other insurance, vacancy, title, incumbrance, etc., affect the quality of the hazard, and are intended to secure a better protection of the property through that vigilance and zeal of the insured which interest alone will stimulate. The infirmities of man's nature are such that, while looking carefully after his own affairs, he may be indifferent to those of others. This principle is fundamental in human conduct, and the underwriter who ignores a fact so important will sooner or later regret it.

§ 7. Contract Personal—Must be Definite and Complete.

An insurance contract is always personal,¹⁰ and when any change occurs in ownership of the property insured the insurer is discharged, unless it consents to accept the new proprietor as a party to the contract;¹¹ and when such substitution is made the new relations continue, subject to the conditions and covenants agreed to by the person originally insured. The sale of an undivided interest, or any change in ownership or possession by which a stranger comes to have

¹⁰ *Carpenter v. Insurance Co.*, 16 Pet. (U. S.) 495; *Sadlers Co. v. Badcock*, 2 Atk. 554; *Lane v. Insurance Co.*, 12 Me. 45; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Cummings v. Insurance Co.*, 55 N. H. 457; *Finney v. Insurance Co.*, 8 Metc. (Mass.) 348; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Quarles v. Clayton*, 87 Tenn. 308, 10 S. W. 505; *Disbrow v. Jones*, Har. (Mich.) 48; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 926; *Kase v. Insurance Co.* (N. J. Sup.) 32 Atl. 1057; *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77.

¹¹ *Farmer's Ins. Co. v. Archer*, 36 Ohio St. 608; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; *Wilson v. Hill*, 3 Metc. (Mass.) 66.

an interest in, or control of, the subject insured, will, under must forms of policies now in use, cause an avoidance.¹²

All valid contracts of insurance must be definite in their terms, as to parties, time, amount, subject, and not contrary to public policy. It is too well known to need stating that a contract will not be complete until the minds of the parties have met in regard to all essential particulars, and in case of an insurance contract, unless this has been done before the fire, no liability will attach to the company with which negotiations for insurance have been in progress. In *Wallingford v. Home Mut. Fire & Marine Ins. Co.* an insurance was applied for, and all the terms agreed upon with the agent, except the matter of rate. A proposal of 9 per cent. was submitted to the company. This was declined, but a counter proposition of 15 per cent. was made in return. This offer was not received by the person desiring the insurance until after the property was burned, and was then promptly accepted. The court held that the contract was not so far completed, on the occurrence of the fire, as to bind both parties in respect to the consideration, and hence it bound neither.¹³

Vague understandings or confused statements of an intended purpose do not comprise the essential elements of an insurance contract.

¹² *Welch v. Insurance Co.*, 23 W. Va. 288; *Boutelle v. Insurance Co.*, 51 Vt. 4; *Lee v. Insurance Co.*, 79 Iowa, 379, 44 N. W. 683; *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019; *Hoffman v. Insurance Co.*, 32 N. Y. 405; *Burnett v. Insurance Co.*, 46 Ala. 11; *Pierce v. Insurance Co.*, 50 N. H. 299; *West v. Insurance Co.*, 27 Ohio St. 11; *Dix v. Insurance Co.*, 22 Ill. 277; *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179; *Finley v. Insurance Co.*, 30 Pa. St. 311; *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279; *Dey v. Insurance Co.*, 23 Barb. 623; *Wood v. Insurance Co.*, 46 N. Y. 421; *Keeler v. Insurance Co.*, 16 Wis. 523; *Savage v. Insurance Co.*, 52 N. Y. 502; *Biggs v. Insurance Co.*, 88 N. C. 141; *Oakes v. Insurance Co.*, 131 Mass. 164; *Shuggart v. Insurance Co.*, 55 Cal. 408; *McFetridge v. Insurance Co.*, 84 Wis. 200, 54 N. W. 326; *People's St. Ry. Co. v. Spencer*, 156 Pa. St. 85, 27 Atl. 113; *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848; *Phoenix Ins. Co. v. Asberry*, 95 Ga. 792, 22 S. E. 717; *German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344; *Hebner v. Insurance Co.* (Ill. Sup.) 41 N. E. 627; *Snow v. Oil Co.* (Tex. Civ. App.) 34 S. W. 177; *Jones v. Insurance Co.* (Iowa) 66 N. W. 169.

¹³ 30 Mo. 46. And see *Patterson v. Insurance Co.*, 5 Ins. Law J. 376; *Continental Ins. Co. v. Jenkins*, Id. 514; *Buffum v. Insurance Co.*, 3 Allen, 360.

There must be mutual agreement and concurrent assent in regard to the following particulars:

First. The subject.

Second. The sum insured.

Third. Duration of the risk.

Fourth. Consideration.

Fifth. Contract must be in *præsent*.

In *Hambleton's Case*¹⁴ there was a parol agreement between the plaintiff and the company's agent to renew the policy, and it was upon this agreement that recovery was claimed. On the trial evidence was produced showing that there was some conversation between the parties on the 2d day of October concerning the renewal of the policy, which expired on that day. The agent of the plaintiff testified that he told the agent of the defendant to make out the renewal, send him the bill, when he would pay the premium, and that the agent of the defendant company replied, "All right." The fire occurred seven days afterwards, and at the time the renewal receipt had not been written, nor had the premium been paid. There had been no communication between the parties, nor had anything been done in the matter subsequent to the interview before mentioned, of October 2d. After the fire the premium was tendered by the plaintiff to the defendant, and by it declined. It was held that there could be no recovery. It was conceded that the agent of the defendant had authority to make contracts of insurance, but that there was no evidence that payment of the premium had been waived. Drummond, J., said: "It was, in this case, incumbent upon the plaintiff to make out the waiver. He must establish that the company agreed to waive payment of the premium on the 2d day of October, 1871. It is not shown that Mr. Parsons (the agent) or the company, or any of the authorized agents, did make this agreement, either in words, or by necessary implication."

*Neville v. Merchants & M. Ins. Co.*¹⁵ is a case where a bill in equity was filed to enforce an alleged contract by parol to insure flatboats, and corn therein. The bill was filed by one Neville, from which it appears that there had been a substantial agreement between the parties in respect to the insurance. On Saturday the

¹⁴ 6 Biss. 91, Fed. Cas. No. 5,972.

¹⁵ 19 Ohio, 459.

secretary of the company wrote Neville, "It may stand insured until Monday, when we shall be glad to see you on the subject." When this letter was written, it was not expected that the boats would start on the voyage until Monday. They did leave, however, on Sunday, and were lost the same evening. It was held that the plaintiff could not recover. The court was of the opinion that the contract to insure was so far incomplete that no action would lie to collect the premium from Neville. It reasoned that if no further negotiations had been had, and the boat had proceeded safely to its destination, there would have been no legal obligation resting upon Neville to pay the insurer, and that, if the company was not entitled to be compensated for the risk, it was not liable for the loss. The court said: "A majority of this court is clearly of the opinion that the premium of 4 per cent. upon \$5,500 could not have been recovered against Neville in case the two boats had proceeded safely to New Orleans without further negotiations in regard to the insurance. If right in this conclusion, the complainant cannot recover. Both parties to the agreement must be bound, or neither can be held liable."

The principle of law here under consideration was lucidly explained by Justice Swayne, of the United States supreme court, in discussing the case of *Insurance Co. v. Young's Adm'r.*¹⁶ Young had applied for a policy of insurance, amounting to \$5,000. The application was dated June 5th, and at the same time a note was signed for the premium, and delivered to the agent of the plaintiff in error. The application was to be forwarded to the home office of the company, and, if approved, the policy was to be returned to Young, through the insurer's agent. The company decided to write the policy applied for, and did so; but made it to become operative on April 5th, instead of June 5th. Before Young could be communicated with, he had received a mortal wound, from which he shortly after died. The policy was never delivered. After Young's death an administrator was appointed, and claim made upon the company for payment of the policy. The only point discussed by the court pertinent to this inquiry related to the contention raised by the plaintiff in error that the minds of the parties had never met as to

¹⁶ 23 Wall. 85-106, 5 Ins. Law J. 17.

the time when the policy should become operative. The court said: "The applicant assented to the proposition contained in the receipt, but the company did not. The company assented to the policy, but the applicant never did. The mutual assent—the meeting of the minds of both parties—is wanting. Such assent is vital to the existence of the contract. Without it there is none, and there can be none. * * * If Young had received notice of the proposition made through the policy, it would have been at his option to give or refuse his assent. He was certainly in no wise bound until such assent was given. Until then there could be no contract on his part, and, if there was none on his part, there could be none on the part of the company. The obligation in such case is correlative. If there is none on one side, there is none on the other. This requisite assent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority. As the applicant was never bound, the company was never bound." ¹⁷

§ 8. Insurer will not be Held, unless Premium is Actually Paid, or There is a Definite Understanding in Regard to Credit.

The clear import of these cases is that the essential elements of a contract must be definitely determined before either party will be bound, and especially does this appear to be true in regard to the time when the policy shall become operative, the term for which it shall continue, the amount of premium to be paid, and either its payment, or a definite understanding in regard to credit. There can be no obligation on the part of the insurer that does not rest on a consideration. There are no natural relations existing between the parties to an insurance contract. Every duty which the insurer may come to owe the insured is created by the contractual relations into which it is brought, and the basis of this is the premium either paid or promised. If, therefore, this matter of prime importance has been neglected in negotiating the terms of insurance, no completed

¹⁷ *Baldwin v. Mildeberger*, 2 Hall (N. Y.) 176; *Coles v. Browne*, 10 Paige (N. Y.) 526; *Crane v. Partland*, 9 Mich. 493.

contract has been made, and no obligation will rest upon the insurer to pay a loss.¹⁸

In *Christie v. North British Ins. Co.*¹⁹ the plaintiff was an assignee of one Stead, and offered to show substantially the following facts, namely, that Stead applied to the Phoenix Insurance Company for a policy on his wire mill to the mount of £2,000, and to the North British Insurance Company for a policy for £3,000; that the risk being somewhat exceptional in its character, and the rate of premium to be charged unknown, the question was referred to the directors of the Phoenix Company, in London. The secretary of the North British Company in London, to whom application was made, said that they would accept the risk at the same rate made by the Phoenix, and that they would make out and deliver the policy as soon as that was ascertained; that Stead on two occasions offered to deposit a sum sufficient to cover the premium. This money the secretary refused to receive, as unnecessary; that a person employed by the North British Company afterwards surveyed the premises, and that correspondence was had between the two insurance offices in regard to the risk and terms of insurance; that the North British made an entry of the insurance in its order book and in its ledger of the number of the intended policy and its date, the column for the intended premium being left blank; that before the fire occurred, on the 30th of May, there had been two meetings of the board of directors of the defendant company; that although there had been no policy issued, or premium paid, the Phoenix Company had paid its proportion of the loss. On these facts the court held that the contract to insure was not complete, and the company was discharged. "If," said Lord Justice Clerk, "the premium in this case

¹⁸ *Zigler v. Insurance Co.*, 82 Iowa, 569, 48 N. W. 987; *O'Reilly v. Assurance Corp.*, 101 N. Y. 575, 5 N. E. 568; *Bradley v. Insurance Co.*, 32 Md. 108; *Wood v. Insurance Co.*, 32 N. Y. 619; *Goit v. Insurance Co.*, 25 Barb. (N. Y.) 189; *Shakey v. Insurance Co.*, 44 Iowa, 540; *Shultz v. Insurance Co.*, 5 Ins. Law J. 354; *American Ins. Co. v. Story*, 8 Ins. Law J. 691; *Harle v. Insurance Co.*, 71 Iowa, 401, 32 N. W. 396; *Harris v. Insurance Co.*, 53 Iowa, 236, 5 N. W. 124; *McMartin v. Insurance Co.*, 41 Minn. 198, 42 N. W. 934; *Continental Ins. Co. v. Hillmer*, 42 Kan. 275, 287, 21 Pac. 1044; *Robinson v. Insurance Co.*, 76 Mich. 641, 43 N. W. 647; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 6 Dak. 458, 43 N. W. 693.

¹⁹ 3 Ct. Sess. Cas. (1st Ser.) 519.

had been agreed on, the insurance would have been effected, although no policy was delivered; but the premises cannot be held to have been insured, the premium never having been determined on, and never having been fixed by the Phoenix office. The plaintiff rests very much on Stead having been told by the secretary that he might hold himself insured, but, without inquiring whether this may warrant a claim in another form of action, it clearly cannot establish a contract of insurance with the company, which is the ground of the present process.”²⁰

Where all the terms of the contract have been definitely settled, except the premium, about which nothing is said, the same risk having been carried by the same company for several previous years, it will be presumed that the last contract is based on the same consideration as the former one. This was held in *Audubon v. Excelsior Ins. Co.*²¹ The burden will, of course, be on the party seeking to enforce the contract alleged to have been made by parol to show that there had been a perfect agreement of parties in respect to all its essential terms before the loss.

The case of *Sanford v. Trust Fire Ins. Co.*²² has long been a leading authority in support of the doctrine that a contract of insurance, under the common law, may exist by parol; but the premium must either be actually paid, or exist as a valid debt against the insured, in order to make the contract complete and enforceable.

Cowles Bros. & Co. were owners of a certain chemical manufactory in the city of New York, and the surveyor of defendant company, one Dammers, solicited them to take insurance on the property mentioned. To this, with some hesitation, they assented. The first interview in reference to the matter between Cowles Bros. & Co. and the surveyor was in June. Shortly after one of the firm met accidentally Dammers, the surveyor, and Wheelwright, president of the insurance company, at a hotel. This meeting was in the evening, and the insurance on the chemical works was referred to, and made the subject of discussion. During this interview the president agreed with Mr. Cowles to write \$5,000 insurance on the property for one year, at $1\frac{1}{2}$ per cent. premium. The whole sum insured was to

²⁰ *Tarleton v. Staniforth*, 5 Term R. 695.

²¹ 27 N. Y. 216.

²² 11 Paige, 547, 2 Benn. Fire Ins. Cas. 400.

be apportioned as follows: \$3,000 on stock; \$1,000 on fixtures, including steam engine; and \$1,000 on building. This insurance was to begin that day. The next day the president made memorandum of the agreement at his office, in the proper books. No policy was issued, as a few days later Mr. Cowles, one of the firm, again met the surveyor, Dammers, and told him that he wished to have the risk differently apportioned, but did not designate in what respect changes should be made. No premium was paid, nor was any charge therefor made upon the books of the insurance office. Dammers, at the suggestion of the president, several times requested Cowles to decide definitely in regard to the apportionment, so that the matter could be closed up; but this he neglected to do, and a few days after, and before the fire, Dammers called on him again, and then said that unless he (Cowles) called that afternoon, and definitely arranged the matter, the company would not consider itself liable in case of a loss. But Cowles did not go to the office of the company at that time, nor subsequently, to give instructions in regard to the apportionment, nor did the firm ever pay or offer to pay the premium. Afterwards, Cowles Bros. & Co. having failed, the plaintiff in this suit was appointed receiver.

The chancellor before whom the cause was tried held that a valid contract of insurance could be made by parol, but said, "The agreement in the case under consideration, however, was clearly not a consummated contract of insurance, and neither of the parties could have so understood it at the time it was entered into." In this conclusion we think the learned chancellor wrong. The meeting of the parties was in the evening, and the risk accepted by the insurance company was to commence at that moment. The terms were all definitely agreed upon. The amount covered was \$5,000. Of this sum, \$3,000 was to apply on stock, \$1,000 on fixtures, and \$1,000 on building; and the premium, $1\frac{1}{2}$ per cent. for one year. In the minds of the parties, there was nothing wanting to make a contract complete and binding from that moment. The premium, it is true, was not paid, but the president agreed that the insurance should begin then; and it is fair to presume that a short credit was intended, at least until the policies were delivered. When the parties separated that night, they must have understood that the property was insured for \$5,000. From that time the premium, \$75, was a debt due from

Cowles Bros. & Co., to the Trust Fire Insurance Company, and its collection could have been enforced by suit. The subsequent notice from C. B. & Co. that they wished to change the apportionment of the risk, and the acquiescence of the insurer, may have had the effect, in law, to suspend or annul the contract; but we think the chancellor wrong in the opinion expressed, that no valid contract had been consummated in the first instance. Of the correctness of the statement above quoted he appears to have had some doubts, for later on in his opinion he said: "Both parties unquestionably understood that, if a loss should occur before the insurance could be consummated in the usual form, the corporation would be answerable therefor; but as there was no agreement to pay the premium, and no implied agreement for a credit beyond the time which was necessary to prepare the policy, the neglect of Cowles Bros. & Co. to pay the premium after they were called upon to complete and consummate the insurance would of itself have been such an abandonment of the agreement as to deprive them of all right to claim pay for the subsequent loss." While the results reached by the chancellor are both legal and equitable, we cannot refrain from pointing out what we regard as the fallacious and mischievous reasoning which chiefly distinguishes a case that is, perhaps, more frequently referred to than any other when parol contracts are the subject of contention. There was involved in this contest an important legal principle, and we insist that it should have the advantage of standing in its own proper relations, without being concealed and incumbered with irrelevant propositions. There was a completed contract made between the parties during the meeting in the evening mentioned at the hotel. The insured owed the insurer for the premium. By clear implication, a short credit was given until the policy was delivered. Had a loss then occurred, the insurer would have been liable. Now, the gist of this matter is, when, and for what cause, did this contract terminate? Did it happen, as suggested by the chancellor, by reason of the inaction of the assured, and the tacit acquiescence of the insurer? Contracts may, perhaps, fall apart in this manner when the cohesion of interests has been weakened on account of the indifference of one or both of the parties, but such a case was not presented. The insurance company unmistakably was anxious to continue the risk. There is nothing in the circumstances to show that it desired to

abandon the undertaking, and the insured could not abandon it without the consent of the insurer. A mere inaction on one part would not have the effect, in law, to cancel or nullify an engagement in which both parties were concerned. What, then, was it that relieved the insurer from payment of the loss? We answer that there was but one valid reason,—the nonpayment of the premium. There was, as before stated, an implied credit until the policy could be made out in the usual course of business, and delivered to C. B. & Co. This was unreasonably delayed by the fault of the insured, and against the protestations of the insurance company. This put the insured in the wrong, and created a default in respect to the payment of the premium, which relieved the insurer from any liability on account of the loss.

§ 9. When Contract is not Complete, because of a Want of Agreement in Respect to Rate and Term of Risk.

The case of *Strohn v. Hartford Fire Ins. Co.*²³ has been for many years a leading authority on the question of what constitutes a consummated contract of insurance. Justice Cole, in delivering the opinion of the court, said: "The court below nonsuited the plaintiff upon the ground that, as there was no time fixed for the expiration of the policy or continuance of the risk, no complete contract of insurance was entered into between the parties. The correctness of this view of the case is the main question before us; for, if sustained, it ends the cause. * * * But it seems to us that the proofs fail to show a valid contract of insurance. The verbal arrangement relied on to show a contract was, in substance, this: Comstock, who effected the insurance, if any contract was made, testified that in the spring of 1872 he contemplated establishing a tobacco warehouse for the storage of tobacco, and when ready to receive it, and when he had received some, he went to Dearborn in relation to insurance. He told Dearborn that he had received some tobacco in his warehouse, and had advertised to receive and store tobacco for other parties, and keep it insured, and sell it, or

²³ 37 Wis. 625.

hold it subject to the order of the owners, as the case might be, and that he wanted to effect some insurance. He says that Dearborn told him that an open policy would be best; the amount, perhaps, would be increasing or diminishing as the time passed along; and he thought it would not be best to issue an ordinary policy of insurance, specifying the amount for a specified time, but that the witness had better have what was called in insurance parlance an 'open policy,' allowing the amount to be increased or diminished as witness thought proper. Before the conversation closed, the witness said to Dearborn: "Insure me \$400. * * * Insure \$400 on tobacco in my warehouse, belonging to me and held by me in store for others." * * * Finally he said he would give me \$400 insurance in the Hartford in that way. * * * Finally he said he would give me \$400 upon any tobacco I had then in the warehouse. I asked him what per cent. He said $1\frac{3}{4}$ per cent. I said: "All right. How about the premium being paid?" Well, he did not know how much it would be, because we did not either of us know how long the insurance would continue on that amount, and he said, "I will call on you when I want the premium. You can pay me when I call for it." I said, "All right." This is all that was said in regard to the first contract, made on the 23d of April. On the 3d of May the witness testified that he went to Dearborn, and said to him, "I want \$1,500 more insurance on tobacco in the rick or warehouse." He said, "Put it in the same open policy as the others"; and I said, "That will be satisfactory to me. With the same premium?" "Yes, sir." I asked him if that was all right. He said, "Yes; make it the same as the other." The conversation in regard to the third agreement was substantially the same as that in respect to the second, except the witness did not remember whether at that interview anything was said about the payment of premium, but he testified that Dearborn said 'he would make the entries and issue a policy in proper time, or he would give him a policy, or would make out the papers.' In the conversation, when anything was said about payment of the premium, the witness said that Dearborn told him he would call upon him for it when he wanted it. Witness tendered no money, but he said he would pay it if Dearborn wanted it. His excuse was that he did not know exactly how much to take, and he would not take it

just then; and the witness closed his testimony with the statement that 'there was nothing said between me and Dearborn as to how long this insurance should run.' This is really all the evidence in relation to the several contracts set out in the complaint, and it seems to us it fails to show that the negotiations resulted in a valid agreement, or that the parties came to an understanding upon all the material conditions of the contract. The amount of premium to be paid, and the continuance of the risk, were not agreed upon, nor was there any stipulation in the agreement from which these important elements of the contract could be fixed and determined. The rate of premium and continuance of policy are certainly important terms in a contract of insurance. * * * The general rule is that, to constitute a valid contract of insurance, the minds of the parties must meet as to the premises insured and the risk, as to the amount insured, as to time the risk should continue, and as to the premium. * * * Suppose a bill in equity had been filed, as is sometimes done, to specifically enforce the performance of the contract to issue a policy; how could the court determine the essential elements of the contract which it was called upon to enforce? How long was the risk to continue,—one month, two months, six months, or a year? All is uncertain and indefinite upon that point. Again, suppose the company had brought action to recover the premium due on the contract; how much could it have claimed and recovered? It seems to us, it is impossible to say. * * * The continuance of the risk is an important element in determining the rate of premium, and how can the company fix its rate when that factor is left entirely indeterminate? A parol contract of insurance, indefinite as to time and as to the rate of premium, is, as it appears to us, incapable of enforcement."

May states the law in regard to parol contracts as follows:²⁴ "There is at least a technical distinction between a contract of insurance, or policy, and an agreement to insure. The latter may—and in point of fact does—exist prior to the drawing up and delivery of the policy, and contemplates the delivery of the policy as a consummation of the agreement; and upon this distinction much important and interesting litigation has arisen, it being settled that

²⁴ May, Ins. § 45.

insurers may now become liable for a loss, although they may not have issued the policy. The question often arises when that liability is fixed; in other words, when the negotiations have reached such a point that if the insurers refuse to issue a policy the courts will interpose to compel them to issue one, or to indemnify the assured to the same extent, and in like manner, as if they had issued the policy. This interposition will usually be successfully evoked when the negotiations have reached such a point that nothing remains to be done by either party but to execute what has been agreed upon."

And he says further:²⁵ "But it is to be carefully noted that unless the parties have come to an agreement upon all the terms of the contract, so that, so far as the terms are concerned, nothing remains open, and nothing remains to be done but to execute what has been agreed upon, the contract is still incomplete, and of no binding force upon either party, even though the secretary of the company informs the applicant that he may hold himself insured, or part of the premium be accepted."

§ 10. Giving of Note for Premium.

When a note in the usual form of commercial paper is given in payment of the premium, such note will be a sufficient consideration for the stipulated indemnity; and, although there may be a subsequent default in payment of the note, the insurer will be charged with any loss which may occur on the policy.²⁶ The case will be otherwise, however, if it is specially provided, either in the note or in the policy, that a failure to pay at maturity will cause an avoidance of the insurance.

In Nebraska a partial payment in a sum larger than the earned premium was held to continue the policy, although it was clearly provided therein that there should be a forfeiture unless full payment was made at maturity. It is doubtful whether this decision can be sustained on principle or by authority.²⁷

²⁵ May, Ins. § 50.

²⁶ Krause v. Assurance Soc., 99 Mich. 461, 58 N. W. 496; Home Ins. Co. v. Curtis, 32 Mich. 402; Carson v. Insurance Co., 43 N. J. Law, 300.

²⁷ Phenix Ins. Co. v. Dungan, 37 Neb. 468, 55 N. W. 1069.

Note was given for the premium, part of which remained unpaid at the time of the fire. Payment was subsequently made of the balance, but re-

Where a company insured its own agent, from whom it had taken the customary bond, and to whom it had given, on other occasions, indulgence in the payment of his premium, it was held that there were no presumptions of intended credit. A deferred payment, if made after a loss, and accepted by the insurer with knowledge of the fire, will be a waiver of the forfeiture.²⁸ But, as payment of premium after a loss is presumptively too late, the burden of showing acceptance will rest on the insured.²⁹

The rule of law is general, and practically inflexible, that an agent cannot pay his own debt with his principal's money; that a debt owing to the insured from the insurer's agent will not excuse the former from making a cash payment of the premium. And this even though the agent proposes that his personal debt be canceled, and the insured take credit for the amount in settlement of his premium.³⁰ There are but few departures from this rule.³¹

turned by the insurer when it learned of the loss. Held, that the failure of the company to insist on payment of the note when due did not amount to waiver of forfeiture. *Dale v. Insurance Co.*, 95 Tenn. 38, 31 S. W. 266; *McEvoy v. Insurance Co.*, 46 Neb. 782, 65 N. W. 888.

²⁸ The insurance was for the company's agent. Policy had been forwarded by course of mail, with the request that insured remit, but payment of the premium had not been made when fire occurred. To avoid the forfeiture, it was urged that the company was protected by an agency bond, and that in former years agent had been favored with credit. It was the opinion of the Iowa court that these facts were immaterial, as they did not justify a presumption that credit was intended. *Moore v. Insurance Co.*, 91 Iowa, 636, 57 N. W. 597.

Acceptance of the premium after knowledge of the loss is a waiver of forfeiture. *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. 417.

When so stipulated in policy, the default in paying premium note will discharge the insurer. See numerous cases cited. *Union Cent. Life Ins. Co. v. Chowning* (Tex. Civ. App.) 28 S. W. 117.

Payment of premium note must be made at maturity, unless payment is excused. *Bloom v. Insurance Co. (Iowa)* 62 N. W. 810.

²⁹ *Moore v. Insurance Co.*, *supra*.

³⁰ *Hoffman v. Insurance Co.*, 92 U. S. 161; *Story*, Ag. § 98; *Aultman & Co. v. Lee*, 43 Iowa, 404; *Drain v. Doggett*, 41 Iowa, 682; *Hall v. Storrs*, 7 Wis. 253; *Higgins v. Moore*, 34 N. Y. 422; *Bertholf v. Quinlan*, 68 Ill. 297; *Holton v. Smith*, 7 N. H. 446.

³¹ The premium was \$30. Of this sum, a payment was made of \$20 in cash, and by agreement with the insurer's agent the applicant was allowed to take credit for \$10 on account of money which the agent had previously

When the insurer has received its premium, it is estopped from saying that payment was not made by the assured. It often happens that, in the accommodations of business, the agent will account to his principal for premiums, and find his advantage in extending a credit to the insured. When this occurs, the debt is a matter of convenience and interest between the person of the agent and the insured, and does not concern the company which issued the policy. Should a loss occur, the insurer would be charged, although actual payment had never been made by the insured.³² The burden of proving that a contract exists will, of course, always rest upon the one claiming its benefits, and it can only be done by a preponderance of testimony.

§ 11. Reformation.

When either party to a contract claims that the written instrument does not express the agreement made, application may be made to a court of equity for reformation; and parol testimony may be produced to show that the contract, as actually agreed to by the parties, was something different from that expressed in the writing. A court, however, will not be justified in ordering a contract reformed, except on such evidence as will leave no doubt that there has been a mutual mistake, and that the contract, as written, does not set forth the intention and understanding of either party. If the writing expresses without ambiguity the agreement as understood by one of the parties, but not by the other, there can be no reformation; for no contract exists to reform, the minds of the parties not having met.³³ The presumptions of law are

borrowed of him. Held, that it was competent for the parties to arrange payment in this manner. *Kerlin v. Accident Ass'n*, 8 Ind. App. 628, 36 N. E. 156.

³² *Krause v. Assurance Soc.*, 99 Mich. 461, 58 N. W. 496; *Miller v. Insurance Co.*, 12 Wall. 285.

Where an offer had been made before the fire to pay the premium, but actual payment had been deferred until the insured's property was destroyed, it was held that such payment must be construed to relate back to the time of the first offer. *Western Home Ins. Co. v. Richardson*, 40 Neb. 1, 58 N. W. 597.

³³ *German Ins. Co. v. Daniels* (Tex. Civ. App.) 33 S. W. 549; *Mead v. Insurance Co.*, 64 N. Y. 454; *Hughes v. Insurance Co.*, 55 N. Y. 265;

all in support of the written instrument, and these can be overcome only when the proofs of error are so positive and convincing as to leave no doubt in the mind of the court that justice requires the reformation asked for.

The general rule of law is that parol testimony cannot be introduced to change or modify the terms of a written instrument. This is a wise and long-established principle for the government of judicial proceedings, and one that is seldom departed from.

Until recently it has been held, almost without dissent, that a contract was an entirety, and if void in part was void in whole, except in cases where both the contract and the consideration were separable on lines of natural division, when the subjects of insurance are rather related than joined. Mr. Parsons states the rule very concisely to be, "If the consideration is single, the contract is entire." This proposition is sustained by a long list of authorities, including nearly all the courts of last resort in this country.³⁴ The principle of law which the rule formulates is elementary, and practically never disputed.

A policy of insurance will be void when its terms are such as to be opposed to public policy. This has been held many times where business has been carried on in violation of the revenue laws, and where intoxicating liquors have been sold without license, or when prohibited by statute. The principle is correctly stated in *Swords v. Owen*:³⁵ "When the laws of a state provide restrictions upon individuals, etc., foreign or domestic, which regulate the manner they shall do business, or, except on certain conditions, any contracts with such individuals, which, if sanctioned, would encourage them to abate, such laws are void."

Ledyard v. Insurance Co., 24 Wis. 496; *Goddard v. Insurance Co.*, 108 Mass. 56; *Hearne v. Insurance Co.*, 10 Alb. Law J. 348; *Mackenzie v. Coulson*, L. R. 8 Eq. 368; *Severance v. Insurance Co.*, 5 Biss. 156, Fed. Cas. No. 12,680; *Moeller v. Insurance Co.*, 52 Minn. 336, 54 N. W. 189; *Schroedel v. Insurance Co.*, 158 Pa. St. 459, 27 Atl. 1077; *Cushman v. Insurance Co.*, 65 Vt. 569, 27 Atl. 426.

³⁴ *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848; *Kansas Farmers' Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983; *Martin v. Insurance Co.* (N. J. Sup.) 31 Atl. 213; *Hibernia Ins. Co. v. Bills* (Tex. Sup.) 29 S. W. 1063; *Fireman's Fund Ins. Co. v. Barker* (Colo. App.) 41 Pac. 514; *Manchester Fire Assur. Co. v. Glenn* (Ind. App.) 41 N. E. 847.

³⁵ 43 How. Prac. (N. Y.) 176.

Each of these subjects will be separately discussed, and authorities examined, in its proper place.

§ 12. A Parol Contract must be in *Præsenti*.

No agreement to insure at some future time, although definitely stated, will be enforceable. The contract, when completed by the distinct assent of both parties to all its terms, will be binding for a future insurance; that is to say, the insurance may take effect at some future time, but the contract must be complete in *præsenti*. In other words, it must be a contract of insurance, not an agreement to insure at some time in the future. In an agreement as to future insurance, from the nature of the business, and the circumstances of change and uncertainty which affect all classes of perishable property, contingencies may arise that would make performance impossible. A simple illustration will make plain this proposition. Suppose Brown to be a general agent of an insurance company, having full power to negotiate insurance, and to bind his company by contracts entered into either in writing or by parol, and agrees on the 20th of December with Smith, the owner of a building, that he will insure it on the 1st day of January following, in the sum of \$5,000, for the term of one year; the premium to be \$50, and to be paid on the delivery of the policy. Thus, the terms are all agreed upon. The minds of the parties have met in regard to every essential fact to the consummation of the contract, but there are possible contingencies involved which would deprive the agreement of any legal force. Suppose, for instance, the building should be destroyed by flood, hurricane, or even fire, on Christmas. When the time arrives that the contract is to become operative, the subject of insurance is no longer in existence. There is nothing to which the policy can attach. What, under the circumstances, would be the situation, should the agent, in carrying out his agreement with Smith, issue a policy, and demand the stipulated premium? Could he enforce by suit a demand so absurd? Most certainly not. Nor is it clear that the case would be different if the policy had been written and delivered at the time of the agreement (December 20th), and a note given for the premium, payable, say, January 1st. Payment could be refused for want of consideration, the property having been destroyed before the risk be-

gan to run. We have shown in a preceding section that, when there is no obligation to pay a premium, there is no liability to pay a loss. But, again, the tenure of Brown's agency is uncertain. His authority to make contracts may be terminated at the will of his principal. He has agreed with Smith to execute a contract of insurance 10 days in the future; and suppose during the interim his power is withdrawn, and when the time arrives for him to perform his agreement he is wholly without authority to act. Nor would the case be changed in any of its essential features should the sudden death of the agent prevent the execution of the contract on the 1st of January. Smith, too, might voluntarily dispose of the property by sale, or it might be sold under legal process, and the relations so changed that he would no longer have an insurable interest. In either event, he could not be held liable to pay the agreed premium to the company which Brown represented. The agreement for this future insurance is purely a personal matter between Brown and Smith, and, should either fail in performance, it is a matter in which the insurance company has no concern. Should Brown neglect or refuse to carry out his agreement to insure the property when the time came to consummate the contract, and a loss should subsequently occur, he would, perhaps, be liable to Smith in an action for damages. Of this, however, we express no opinion, as it is not a subject for discussion properly within the scope of this work.

The case of *Buffum v. Fayette Mut. Fire Ins. Co.*³⁶ is referred to as an authority in support of the proposition that an agent in a case such as the one we have here supposed would be held liable in a personal action for damages. There the policy had not expired when the insured called on the treasurer of the company and said to him, "I want to see about the policies, and want to extend the time to the 1st day of May, when I shall have funds." Chadwick, the treasurer, replied, "I do not know what I can do." Then Allen, the insured, expressed the urgency of the matter by saying: "If I must, I will go out and borrow the money. At any rate, I do not want the policies vitiated." The treasurer, desiring to oblige Allen, answered, "No, I will take the responsibility, and if anything happens I will see the premium paid;" then adding, "Now, you understand that if anything happens the re-

³⁶ 3 Allen (Mass.) 360.

sponsibility stands on me." On May 2d the property burned, and it was not until the expiration of three months after the fire that a tender of the premium was made, and soon after suit was commenced. The court said: "It is quite obvious that Chadwick did not, as agent of the company, agree that he would use their funds to pay this premium, but it was in his private capacity that he agreed to advance the money. Although he was treasurer, his private capacity would not bind the company. If he made a valid agreement in his private capacity, the remedy would be against him, if he violated it, and no claim against the company could arise out of it."

These cases, of course, are easily distinguishable in important particulars. Chadwick could have paid the money, but failed to do so. There was no limitation upon his powers,—no contingencies involved. There was an absolute personal agreement to perform a thing which he might have done, but did not. In the case of the agent, Brown, there is this important difference: He agreed to do something which, in a possible contingency, would be absolutely beyond his power. This fact, the law will presume, was understood by Smith, and that there was an implied qualification of the agreement entered into,—that it might be defeated by events possible to arise. It is very doubtful, therefore, whether agreements of this character contain enough of the elements of a contract to form the basis of an action for damages.

The author does not find that any of the writers on insurance law have ever examined the principle here discussed,—that a parol contract of insurance must always be complete in præsenti. In the case of *Taylor v. Phenix Ins. Co.*³⁷ the doctrine here contended for is fully sustained. The facts are clearly stated by Lyon, J., in his opinion. He said:

"The proof of the alleged contract of insurance is all contained in the following testimony of the plaintiff. After testifying to a conversation with Mr. Towell before the policy expired, concerning its renewal, he proceeded as follows: 'Afterwards, and on the 18th day of June, I had a conversation with Towell about renewing the policy. I met Towell in front of the post office, and said to him: "I want to renew that insurance policy of mine. I am going

³⁷ 47 Wis. 365, 2 N. W. 559, 8 Ins. Law J. 851.

away to be gone a week or ten days, and I want it done before I leave." He said, "All right." I then said: "Mr. Hopkins offers to insure my property at 2 per cent., and you charged me 2½ last year. I do not want it in those local companies. I would rather have it in the same company, and have it renewed. Won't you do it at 2 per cent.?" He answered, "I will." I said again: "I am going to leave for Palmyra and Brodhead, to be gone a week or ten days. Is there anything else you want me to do?" "No; nothing else. I have the description in the office, and will attend to it." I said to renew the old insurance policy the same as it was before, in the same company and the same amount, and he said, "All right." I went away that day, and returned again in about ten days, on the day before the fire.'

"We fail to find in the above testimony satisfactory evidence of a renewal of the policy in præsentī. The purport of all the conversation on the subject between the plaintiff and Mr. Towell was that the policy should be renewed thereafter,—not that it was then renewed. The plaintiff said to the agent that he wanted it renewed, and desired that it should be renewed before he left home. The agent assented. They then agreed upon the premium to be paid therefor. The agent said there was nothing more for the plaintiff to do, but that he (the agent) had the description of the property to be insured in his office, and promised to attend to the matter of renewal. The plaintiff then directed the agent to renew the old policy the same as it was before, in the same company and for the same amount, and the agent promised to do so. That is all there is of the alleged parol contract of renewal. It seems to us that the whole conversation pointed unmistakably to some further act to be done to renew the policy,—to a renewal in futuro. Else why talk about the agent having the description in his office, and his promise to attend to the business, and why the closing direction to the agent to renew the old policy in the same company, and for the same amount? If the policy was then and there renewed, the description ceased to be material, and the promise was superfluous, as was also the final direction to the agent to renew. Indeed, both the promise and direction tend strongly to prove, if they do not prove conclusively, that neither of the parties intended a contract of renewal in præsentī, or supposed they had made any

contract other than an executory oral contract that the company should renew the policy, and the plaintiff should pay the premium at some early future time. There is no evidence whatever inconsistent with the hypothesis that the agent was to make a certificate of renewal, and the plaintiff was to pay the premium, as conditions precedent to the renewal, or to show that the parties intended a contract out of the usual course of the business of insurance. It is our duty to construe the alleged parol contract as established by the proofs, and we are constrained to hold that it is not a contract of insurance in *præsenti*, and contains no waiver of the conditions contained in the policy sought to be renewed.”³⁸

³⁸ In *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 29 Pac. 826, 8 Utah, 41, the agent, Mallory, of the defendant company, was cashier in a mercantile establishment for plaintiff, and had been instructed by the latter to renew the policy, insuring the property when it expired, which would be some two weeks later. To this the agent agreed, but neglected to do so, and, the property having burned, action was brought to recover on a parol contract to insure. The court said: “It was the duty of Mallory, under the instructions of plaintiff's manager, to continue the risk, after the old policy expired, by reinsuring, but the evidence shows that he neglected to do this. For the failure to follow plaintiff's orders, the defendant cannot be responsible. It is apparent that Mallory failed to make the contract that he was authorized and instructed by plaintiff to make. An agreement to make a contract at a future day is not the equivalent of the one to be made, or of a present contract, though all the terms to be put in the latter are agreed upon. If one of the parties to the first agreement refuses to bind himself when the time comes, the court may compel a specific performance of it, if from the facts it would be equitable to do so; and if performance is decreed a judgment may be entered in the case for the amount found to be due the plaintiff on the contract, if any amount is then due the plaintiff by its terms, or an action may be instituted on it if either party refuses to comply with it. By the language used on the 1st of February, the defendant did not assume the risk the plaintiff contends that he did. That language had reference to insurance thereafter to be made. The plaintiff has set up in his complaint a contract in *præsenti*. This action is not for specific performance.” *Zigler v. Insurance Co.*, 82 Iowa, 569, 48 N. W. 987; *Taylor v. Insurance Co.*, 47 Wis. 365, 2 N. W. 559; *Sargent v. Insurance Co.*, 86 N. Y. 626; *Dinning v. Insurance Co.*, 68 Ill. 414; *Markey v. Insurance Co.*, 118 Mass. 178; *Myers v. Insurance Co.*, 121 Mass. 338; *O'Reilly v. Assurance Corp.*, 101 N. Y. 575, 5 N. E. 568; *Patterson v. Insurance Co.*, 5 Ins. Law J. 376; *Continental Ins. Co. v. Jenkins*, Id. 514.

The rule in respect to a parol agreement for future performance is well

§ 13. When the Risk Begins.

Where the agent is authorized to accept proposals for insurance and forward them to the company, or to some officer having authority to issue policies, and it is understood, and so stated in the proposal or application, that if the risk is accepted the insurance shall begin on the day when the proposal is made and signed by the applicant, and the property is burned after the policy is written and deposited in the mail, but before it is received by the applicant, the company will be held for a loss.³⁹ When the risk is thus submitted for the

illustrated in *Baumgartel v. Insurance Co.*, 136 N. Y. 547, 32 N. E. 990. The plaintiff held a policy in the defendant company, with the usual stipulations that it should become void if there was other insurance without notice, and written consent indorsed on the policy. The plaintiff gave evidence at the trial of the case that soon after procuring other insurance he met the defendant's agent on the street, and informed him that he had obtained another policy for \$1,000, and that the agent replied: "All right. I will attend to it." The court, in commenting on the fact, said: "At most, the language of the agent amounted to nothing more than his personal promise to do something in the future, and neither he nor the company could be held to be in default with respect to such promise until the plaintiff had presented the policy to him, and requested him to make the indorsement. * * * The act which was necessary to continue the policy in force was never performed, and the conversation between the plaintiff and the agent imported nothing more than an understanding that at some future time the plaintiff would produce the policy, and the agent would make the necessary indorsement. If the plaintiff understood by what was said that the agent would at some time seek him out and give the written consent in the manner required, the company would not be responsible for the neglect of the agent in that respect."

In *Hartford Fire Ins. Co. v. Davenport* the court said: "In this case the vacancy concerning which the parties conversed, if there was any such conversation, was one contemplated in the future, and the stipulation or understanding, if it amounted to anything, was an executory contract, intended to form a part of the contract of insurance. This being so, the doctrine cannot be admitted that any part of the contemplated contract can rest in parol." 37 Mich. 609, 72 Ins. Law J. 228.

³⁹ *Dalley v. Accident Ass'n*, 102 Mich. 289, 57 N. W. 184; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060; *Hartford Fire Ins. Co. v. King* (Ala.) 17 South. 707; *Elliott v. Grand Lodge* (Kan. App.) 42 Pac. 1009; *Phoenix Ins. Co. v. Hague* (Tex. Civ. App.) 34 S. W. 654; *Beckwith v. Cheever*, 21 N. H. 41; *Stebbins v. Insurance Co.*, 60 N. H. 65-70.

inspection and approval of the company, any act on its part clearly signifying an acceptance of the hazard ends the negotiations in a completed contract, and should a loss subsequently occur the company will be liable. That the deliberations of the company have finally resulted in a decision to accept the risk will be presumed, if it is shown that the policy has been written and sent to either the applicant or the solicitor of the company, with instructions to deliver it to the insured. It is quite immaterial whether the policy has been received by the applicant before the destruction of the property. If it has been written, and placed in the post office, to be forwarded by course of mail, or sent by special messenger, it cannot be recalled, or subsequent delivery prevented, so as to relieve the company from payment of the loss. The application usually presents to the company a definite proposal for insurance. All the essential terms of the contract desired by the applicant are set out. When this proposal is accepted, the negotiations are terminated, and the contract is complete. The subsequent writing and delivery of the policy has no important significance, except as evidencing that the minds have met, and a conclusion been reached expressing the mutual intent of the parties. This might in most cases be otherwise shown, but when the policy, as before stated, is deposited in the post office, addressed to the applicant, or to the agent, with instructions to deliver it to the applicant without condition, the undertaking to insure on the part of the company is beyond recall, and should a loss occur before the policy reaches the insured the company cannot escape payment; and this will be true although after the policy is mailed to the agent the company learns that the property has burned, and immediately telegraphs to decline the risk and return the undelivered policy.⁴⁰

⁴⁰ The negotiations for insurance were conducted through the medium of the mails. The conclusion reached by the court was, that when a proposal is offered by letter, and accepted in the same manner, the negotiations end in a completed contract when the letter signifying acceptance is deposited in the mail. This conclusion is based on the proposition that the post is the agent of the one first employing it as the medium for negotiations. In order to make a contract complete, the acceptance must be identical with the terms proposed. *Hartford Steam-Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629.

Application was made on September 12th, and approved by the company,

Unless the acceptance is in the same terms as the proposal, nothing will be concluded, as there will be lacking the essential element of accord. From this rule there can be no departure. In the interests of justice, the courts frequently read between the lines of a contract, and find implied, or, by forced construction, a "saving clause." An instance of this kind is presented in the case of *Dailey v. Preferred Masonic Mut. Acc. Ass'n.*⁴¹ The proposal was for accident insurance, and set forth that the applicant was a conductor for a passenger train. The policy subsequently issued, of which the proposal or application was made a part, provided that the insurer should not be liable for any injury caused while "entering or alighting from a moving train." It was the opinion of the court that, the occupation of the insured being clearly explained in the application, it must be presumed to have been within the contemplation of the parties that the insurance applied for was intended to cover all the ordinary hazards incident to the duties of a passenger conductor, among which was entering and alighting from trains while in motion; that on acceptance of the application the contract was complete, and free from the restrictive clause mentioned.

It is the law in New Hampshire that any act on part of the insurer in reference to the application, indicating its satisfaction with the risk, such as writing the policy, unless such act is brought to the knowledge of the applicant, will not be conclusive as to the completion of the contract; in other words, "A proposition does not

to whom it was referred, on September 19th; but policy was issued of the 22d, at which time it was written. On September 21st the insured property was burned, which fact was unknown to the agent who wrote the policy. It was held that the contract was complete on the 19th of September, at which time the company signified its approval of the risk.

In *Perry v. Insurance Co. (N. H.)* 33 Atl., on page 733, the court said that, at any time before notice to the applicant of the acceptance of the application, either party was at liberty to withdraw from the undertaking. "A proposition does not become a contract until the maker or his agent is notified of its acceptance." See *Stebbins v. Insurance Co.*, 60 N. H. 65-70; *Beckwith v. Cheever*, 21 N. H. 41; *Fried v. Insurance Co.*, 50 N. Y. 243, 47 Barb. (N. Y.) 127; *Cooper v. Insurance Co.*, 7 Nev. 116; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

⁴¹ 102 Mich. 289, 57 N. W. 184.

become a contract until the maker or his agent is notified of its acceptance.”⁴²

§ 14. When the Insurer will be Liable for Loss Occurring before the Contract is Made.

In *Hallock v. Commercial Union Ins. Co.*,⁴³ the agent of the defendant was not authorized to make binding contracts of insurance. His appointment was only to solicit, take applications, and forward them to the company; and, when accepted, policies were returned to him to be delivered to the insured. In this instance the application provided that, if a policy was issued on the proposals submitted, such policy should be of even date with the application, which was March 12th. The applicant offered to pay the premium to the agent at that time, but was told by him to keep it until called for. The next day a policy was issued, and sent to the agent for delivery. Meanwhile, and 10 hours before the policy was actually written, the property was destroyed by fire. Defendant, having learned that the property was burned, telegraphed its agent not to deliver the policy. This instruction was obeyed, although the agent did receive the premium, a tender having been made after the fire. The court held that the contract was complete when the proposal was accepted, and that it became operative, in accordance with its own terms, at noon on the 12th day of March, while the property was still in existence. While the correctness of this decision has been questioned, we fail to find that it violates any principle of law. It is true that when the proposal was accepted, and the contract became for the first time a subsisting obligation, the subject of insurance had ceased to exist; but, by the terms of the agreement, if the risk was accepted by the company it should begin at noon on the 12th day of March. That it was competent for the parties to make contracts that should relate back, and be operative from the time of the beginning of the negotiations, or to any other period, there is no good reason for doubt. If it were otherwise, then, in this case, had the property not burned

⁴² *Perry v. Insurance Co.* (N. H.) 33 Atl. 731; *Moore v. Insurance Co.*, 62 N. H. 240.

⁴³ 26 N. J. Law, 268, 27 N. J. Law, 645.

when it did, the company would have received a premium for carrying the risk one day when no liability existed. In marine insurance this principle is recognized, and the liability of the insurer is not made to depend upon the unknown contingency of whether the property at the time the contract is entered into is lost or not. The circumstances of that class of hazards make it often necessary to the interests of commerce that insurance should be effected on such a basis, and it is difficult to distinguish any underlying principles that will justify the custom in marine insurance, and at the same time condemn it, as repugnant to public morals and the interests of property, in a form of contract that may sometimes serve the convenience of parties, in the case of fire hazards, without in any manner creating a temptation for the commission of crime.

§ 15. When the Contract Terminates.

Insurance contracts generally provide for the termination of the risk at the option of the insurer, by cancellation. When this is done the insurer cannot be relieved from liability, except in substantial conformity with the stipulated terms of the policy. If a notice of intention to cancel is provided for, such notice must be given to the insured, or to some person having authority to receive and act upon it, and a tender of the unearned premium must be made. If the insurance was effected through a broker, unless the circumstances were such as clearly to make him the agent of the insured, notice to such broker of the intention to cancel, and the payment to him of the return premium, will not be sufficient. The tender, too, must be for the full amount of the unearned premium, and made without any qualifying condition.

In *Quong Tue Sing v. Anglo Nevada Assur. Corp.*⁴⁴ the California court has discussed this subject of cancellation under circumstances that present several interesting and important legal propositions. The insurance was procured by one Brandon, acting as a broker for the defendant company, who, being dissatisfied with the risk, instructed its local agent to cancel. The policy had a provision as follows: "This insurance may also be terminated at any time, at the

⁴⁴ 86 Cal. 566, 25 Pac. 58.

option of this corporation, on giving notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of this policy to any person named in the policy, whether as owner, mortgagee, or otherwise. It is also a part of this contract that any person other than the insured, or the duly-authorized agent of this corporation, who may have procured this insurance to be taken by this corporation, shall be deemed to be the agent of the assured named in the policy, and not of this corporation, under any circumstances whatever, or in any transactions relating to this insurance." The local agent undertook to secure a cancellation through Brandon, the broker; and, it being understood between them that the plaintiff was urgently desirous to continue the insurance, the agent, to meet and anticipate his wishes, procured from another company a policy for \$750, being one-half the amount written by the defendant. With this other policy, and one-half of the premium originally paid by plaintiff, the broker, Brandon, went to the store of plaintiff, and informed him that the policy in defendant company was canceled. This the plaintiff objected to, and said that he wanted the whole sum of his insurance in one company. The broker, having tendered the \$750 policy, and the balance of the premium in coin, advised the plaintiff to retain the policy offered, of \$750, as he had no other insurance; that the policy in defendant's company was canceled. Under this representation, Quong Tue Sing retained the policy for \$750, but did not accept the balance of the premium tendered, and said he "wanted nothing to do with it"; that he "wanted all of his insurance in one policy." The trial court found on these facts that the defendant's policy had been properly canceled before the fire occurred, and that there was no cause of action. This judgment the supreme court refused to sustain. We quote from the opinion of Wood, J., as follows:

"To maintain the conclusion reached by the court below, it must have been shown either that the conditions upon which the company was allowed to cancel the policy were strictly complied with, or that insured, knowing of the facts, waived such compliance.⁴⁵ It is an undisputed point that the agent of the company did not act directly with the insured. The tender of so much of the unearned premium as was returned was tendered, not to the applicant, but to Brandon. There-

⁴⁵ *Bennett v. Insurance Co.*, 115 Mass. 241.

fore, in order to render the tender effective, if otherwise sufficient, it was necessary to show either that Brandon was at the time the authorized agent of the insured, for the purpose of the cancellation of the policy, or that, not being authorized at the time, his acts were ratified by the insured. There is an entire lack of any evidence even tending to show that Brandon had any authority to receive the unearned premium under the policy, or to accept a cancellation of it on any terms, unless such agency is established by a mere showing that he was the applicant's agent in procuring the insurance. That an agent authorized to procure insurance is not thereby made the agent of the insured to cancel the policy, is well settled.⁴⁶ This being so, he was not the agent of the insured, and had no authority to bind him, either by the acceptance of a strict tender of the unearned premium, or the waiver of such tender by the acceptance of an insufficient one. The tender in this case was not sufficient. There must have been an actual tender to the applicant, or his authorized agent, of the full amount of the unearned premium.⁴⁷ This tender was not made. There was tender of only a part of the premium, and another policy of insurance in another company. * * * Two things were necessary in order to effect the cancellation, namely, notice of intention to cancel, and the return of the unearned premium. The notice required was not given. Brandon, who, as we have seen, was not the agent of the applicant, simply informed the latter that his policy had been canceled, and that he had no insurance, neither of which statements was true.

"It is contended by the respondent that, because appellant accepted a policy in another company, he thereby waived the notice and strict tender required by the policy; but the evidence shows conclusively that he did not consent to accept the policy for \$750 tendered him, but refused to do so, although it was left with him, and insisted upon having \$1,500 insurance all in one company, and that he refused to accept the money tendered him. He did express a desire and will-

⁴⁶ *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. 341; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207; *Broadwater v. Insurance Co.*, 34 Minn. 466, 26 N. W. 455; *White v. Insurance Co.*, 120 Mass. 330; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

⁴⁷ *May, Ins.* § 69; *White v. Insurance Co.*, *supra*; *Indiana Ins. Co. v. Hartwell*, *supra*.

ingness to procure and accept another policy for \$1,500, and perhaps, if such a policy had been procured for him, he would have been willing to accept it and surrender the one sued on, but such a policy was not procured for him. He never at any time consented to accept anything else in lieu of the policy sued on, or to accept less than the full amount of the premium due him on a cancellation, or to deliver up the policy. He kept the \$750 policy on the strength of the erroneous statements of Brandon that the policy sued on had been canceled, and that he had no insurance."

In the case of *Mutual Assur. Soc. v. Scottish Union & Nat. Ins. Co.*,⁴⁸ the insurance was procured by plaintiff through a broker. The policy of defendant provided, in proper form of words, for cancellation, by giving either written or verbal notice, and tendering a ratable proportion of the premium for the unexpired term. It also provided, "If any broker, or other person than the assured, or the duly-authorized agent of the company, has procured the insurance, or any renewal thereof, he shall be deemed to be the agent of the assured, and not of the company, in any transactions relating to this insurance." Notice of cancellation was given to the broker, but it was admitted that the plaintiff had no knowledge of any attempt on the part of the defendant to cancel its policy until subsequent to the fire. To support the contention of the defendant that notice to the broker who procured the insurance was notice to plaintiff, testimony was permitted to show a well-established usage in the city of Richmond, Va., where the property was located and the insurance effected, among companies' agents and brokers, that, whenever insurance policies were obtained through a broker, all notice of cancellations required were given to him, instead of the assured. The trial judge instructed the jury that if they found such a custom existed, and that notice had been given to the broker who effected the insurance, they should find for the defendant, and there was verdict and judgment accordingly. The only important contention in the case was whether there had been such notice of cancellation as the contract required. The court held that, while the broker was the agent of the assured in procuring the policy in suit, his authority did not continue beyond that act; that they must look to the terms

⁴⁸ 84 Va. 116, 4 S. E. 178, 17 Ins. Law J. 570.

of the contract itself, and not to either a local or general custom, to determine what was necessary to be done in order to terminate the policy by cancellation. In support of the proposition that the broker was the agent of the insured only for obtaining the policy, the court quoted from Judge Andrew, in *Hermann v. Niagara Fire Ins. Co.*, supra, as follows: "The defendant reserved the right to cancel the policy on notice to the assured. This condition would be satisfied by personal notice to plaintiff, or to the agent authorized to receive it; but the authority of a broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal's property, terminates with the procurement of the policy. It cannot, in reason, be held to continue after the insurance has been procured, and the policy delivered to the principal. An agent to procure a contract has no power to discharge it, implied from the original authority merely. If he possesses that power, it arises from some actual or apparent authority, superadded to the mere power to enter into the contract. The defendant relies upon a special clause in the policy, which declares that the person who procures the policy shall be deemed the agent of the assured, and not of the company. The obvious meaning of the clause is that the person procuring the insurance shall, in respect to that matter, be deemed the agent of the insured."⁴⁹

The court assumed the law to be well settled in respect to that question, and then proceeded to say: "The policy requires notice to be given of the desire to cancel to the assured; and the question, therefore, is whether the broker was the agent of the assured for this purpose. The question is not what the local custom of Richmond is as to this notice, but what is the contract on the subject between the parties."

§ 16. Authority of Broker to Consent to Cancellation of Policies.

When an agent or broker, as it frequently happens, is charged with keeping a particular property insured, without being required

⁴⁹ *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207; *White v. Insurance Co.*, 120 Mass. 330; *Adams v. Insurance Co.*, 17 Fed. 630; *Von Wein v. Insurance Co.*, 52 N. Y. Super. Ct. 490.

to report specifically to his principal, the owner, the names of the companies in which the insurance is placed, having full authority to select such policies as he may deem satisfactory, such person will be held to have general powers in reference to any matters concerning the placing of such insurance, and may accept notice of cancellation, substitute the policy of one company for another, and bind his principal by waiver or express agreement in writing, or by parol.⁵⁰

In *Buick v. Mechanics' Ins. Co.*,⁵¹ plaintiffs arranged with one F. O. Davenport, an insurance broker, to take care of their insurance. This relation had continued for several years. Plaintiffs were not familiar with insurance contracts, and referred every detail of that department of their business to the broker, Davenport. They designated the amount of insurance to be written, but left all else to the discretion of their agent or broker. The policies, however, were always sent to plaintiffs. About the middle of August, 1892, Davenport was instructed to procure \$4,000 insurance on the contents of a particularly specified building. This order was promptly executed, and \$1,000 of the amount named was placed with the Michigan Fire & Marine Insurance Company. No premium on this policy was ever paid. Some two weeks later the Michigan Fire & Marine telephoned Mr. Davenport that they wished to cancel. He replied, "Very well," and on the same day rewrote the insurance in the defendant company through its authorized agents at Detroit. Of this fact the Michigan Fire & Marine was an hour or two later informed. Three days afterwards the property burned, and the Mechanics' Insurance Company declined to pay. The trial court found, as matter of law, that Davenport, acting within the scope of his authority as agent for plaintiffs, could substitute one policy for another, and that his action in this regard made the policy in suit a valid and subsisting contract at the time of the fire. The supreme court of Michigan, sustaining this finding, said:

"The plaintiffs intrusted the whole subject of the insurance to

⁵⁰ *Schauer v. Insurance Co.*, 88 Wis. 561, 60 N. W. 994; *Buick v. Insurance Co.*, 103 Mich. 75, 61 N. W. 337; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *Dibble v. Assurance Co.*, 70 Mich. 1, 37 N. W. 704; *Stone v. Insurance Co.*, 105 N. Y. 543, 12 N. E. 45.

⁵¹ 103 Mich. 75, 61 N. W. 337.

Davenport, and had done so for years. They did not even know in what companies they were insured. The Michigan company dealt with the broker, Davenport, alone. He assented to the cancellation, obtained the new policy now in suit to take the place of the Michigan policy, and delivered it to the plaintiffs before the fire, with notice of the cancellation and the substitution. Plaintiffs received it, but did not open the envelope containing it, and it was consumed in the fire. We think this case is clearly within *Hartford Fire Ins. Co. v. Reynolds*,⁵² in which it is said, at page 507, 'It is certainly not necessary to give notice to the principal who deals through a broker, who is notified.'⁵³ The Michigan policy provides for cancellation upon five days' notice. This provision, however, can be, and in the present case was, waived by the assent of both parties to the contract. Such waiver did not affect or change the defendant's liability. If the parties to the Michigan company's policy now fit to waive the provision, the defendant cannot question it."

It will be observed that the court mentions in this case that no premium had been paid the Michigan Fire & Marine, but does not intimate in what respect this fact has any significance as affecting the rights of either of the parties to the litigation. It is quite clear that the court was in no way influenced in its judgment by any considerations concerning the premium. The real question involved was determined by the important fact of Davenport's power to act for the insured, without special instructions, in regard to the substitution of the Mechanics' policy for that of the Michigan Fire & Marine.

The same rule of construction is found in *Schauer v. Queen Ins. Co.*⁵⁴ The plaintiffs there owned a grist mill, on which they had been accustomed to carry a large amount of insurance. A part of this was written in companies for which Warren & Son were agents. On account of the uncertainty and inconvenience in dealing with different agents in respect to a matter with which they were not wholly familiar, plaintiffs in the fall and winter of 1892 requested Warren & Son to take charge of all their insurance on

⁵² 36 Mich. 502.

⁵⁴ 88 Wis. 561, 60 N. W. 994.

⁵³ *Dibble v. Assurance Co.*, supra.

the mill, stating the amount to be carried, but it does not appear that any instructions were given as to what particular companies the risk should be placed with. Warren & Son agreed to keep the property insured. Among the policies procured was one of \$1,500 in the Oakland company, which was ordered canceled by the insurer early in January, 1893. This policy was replaced by Warren & Son, they writing another with the defendant in this suit for the same amount. About January 13th plaintiffs were notified by Warren & Son of the substitution of the Queen for the Oakland policy, and to this they expressed their satisfaction. On January 14th the manager of the defendant company at Chicago wrote Warren & Son to immediately retire their policy. This letter came by course of mail to the hands of Warren & Son on January 15th, and on January 19th they entered a cancellation of the policy on their agency record; and it appears that thereafter they diligently sought to replace the insurance with other companies, applying through their correspondents at Chicago, Green Bay, and possibly elsewhere, but before any arrangements were consummated the fire occurred, on January 25th. In delivering the opinion of the court, Judge Cassoday said:

"The only question presented is whether the policy was effectually canceled by the notice so given to Warren & Son, under the clause of the policy which provides that 'this policy shall be canceled at any time at the request of the assured, or by the company, by giving five days' notice of such cancellation.' The only objection to the notice is that it should have been given to the plaintiffs personally, instead of Warren & Son, but we are clearly of the opinion that the trial court was right in holding, as a matter of law, upon the undisputed evidence, that the business arrangements between Warren & Son and the plaintiffs in reference to their insurance authorized Warren & Son to receive such notice of cancellation. * * * Upon the facts stated we must hold that the duties of Warren & Son to the defendant and to the plaintiffs were in no sense repugnant." ⁵⁵

A careful distinction should be observed between brokers who are

⁵⁵ Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502; Stone v. Insurance Co., 105 N. Y. 543, 12 N. E. 45.

only authorized to procure policies of insurance on specified property to a stated amount, in designated companies, and those whose agency extends to the exercise of a discretion as to what policies shall be accepted and what rate of premium paid. In the first case the broker has but one duty to perform, the procuring of the policies, and turning them over to the insured. When this is done it will most frequently happen that the agency is terminated, and notice to the broker of cancellation, or of any other matter affecting the action of the parties, will not charge the insured with knowledge. But the rule is different in respect to the second class mentioned. The agency there is of a larger scope, and more general character. The requirement is not to obtain policies to a certain amount, but to keep the property insured in responsible companies. This imports a measure of freedom and permission to exercise important discretionary powers, and while these relations continue, although the broker may be only a special agent of the insured, it is clearly within the apparent scope of his authority to bind the insured by accepting notice of cancellation, and by surrendering one policy, and replacing the insurance thereunder with a different company.⁵⁶ The responsibility and rights of the parties concerned will not be essentially changed when the person selected by the property owner to take charge of his insurance business holds the appointment as agent of various insurance companies, and has authority from them to make contracts to insure, and to write and deliver policies. The same rule of law above explained as applicable to brokers will control the conduct of persons who are the acknowledged agents of both parties, qualified only by the fundamental principle of agency, that a person sustaining a relation of confidence and fidelity to both parties will not be permitted to act when judgment is required or interests conflict.

In *Stone v. Franklin Fire Ins. Co.*,⁵⁷ Longford & Co. were the agents of the defendant, who wrote the policy. They were dealing with a broker named Frank. On the 26th of February these agents wrote Frank that the defendant wished to cancel the policy in suit, and that they would do so at noon of the 28th of that month. As

⁵⁶ *Buick v. Insurance Co.*, supra; *Schauer v. Insurance Co.*, supra.

⁵⁷ 105 N. Y. 543, 12 N. E. 45.

there had been no premium paid, the court held that defendant had no duty to perform in that respect. The policy was issued to the Standard Tinware Company, and before suit was assigned to the plaintiff, Stone. The court said: "We are of the opinion that, upon the undisputed evidence, Frank was so far the agent of the tinware company that notice to him was notice to that company. He had been the agent of the tinware company for about two years, through whom it procured insurance upon its property from various companies; in all, to the amount of \$10,000. It does not appear that he received any particular instructions as to the companies from which he was to receive insurance, or as to the rates of premium, or the amount to be insured in any particular company. It is inferable that all these matters were left to his discretion."

It should be noted that the president of the tinware company at the trial testified that Frank was not his agent,—only a broker whom he had authorized to obtain the insurance. Frank also stated in evidence that "he had nothing to do but to place business as Scheider (the president of the tinware company) ordered him to do." The court characterized this testimony as mere expressions of the witness' opinion, and without such legal effect as to impair the force and significance of the other evidence offered, which it thought sufficient to fully establish the agency of Frank. It said, "If, upon the evidence, the jury had found that Frank was not authorized to receive notice, their verdict would have been so far contrary to the evidence that it would have been the duty of the trial judge to set it aside."

When the agent of the insurance company is also agent of the insured, a request made to him by the insurer to cancel a policy will not be notice to the insured. The courts will not go so far in recognizing the dual character of an agent acting in antagonistic relations as to endow him with the legal capacity of giving notice to himself.⁵⁸

§ 17. In What Manner Cancellation can be Made.

Unless the policy provides that it may be terminated at the option of one or the other of the parties, it will continue to the end

⁵⁸ British-American Assur. Co. v. Cooper (Colo. App.) 40 Pac. 147.

of the term for which it is written, except, of course, it is canceled by mutual consent.⁵⁹ In such a case, the abrogation of the contract depends upon the same conditions of agreement as has been shown were indispensable in its formation. As the minds of the parties must have met to create a contract, so, too, they must meet as to its termination, unless the obligation is made to end in some other manner by the original agreement. Where the right to cancel on notice is reserved, it is important that conformity be had in all material respects to the provisions of the policy concerning such notice. If it is to be given so as to allow a certain number of days to intervene before the cancellation shall become effective, compliance must be had with so much strictness that no substantial right can be violated. Thus, if the policy stipulates that the insurer may cancel, on giving the insured a notice of 10 days in advance of the time when cancellation is to take effect, a notice of less time, as 9 days, will not entitle the insurer to the right to cancel. The notice should not merely express a desire to cancel. Desire is not intention, nor is it cancellation. The exact time when the liability of the insurer will terminate should be definitely stated, and a return of the premium either made or tendered. A refunding of the unearned premium, of course, need not be made until the time has arrived when cancellation is effected, and a surrender of the policy required. When the policy has become void on account of a breach of its conditions, there is no rescission, and no return premium can be demanded. When the policy is so conditioned that the insurer shall have the right to either cancel or declare a forfeiture in the event of certain contingencies, and such contingencies arise, the insurer must declare its intention to exercise its right within reasonable time, or it will be deemed to have been waived. Thus, in a Nebraska case the policy provided that, if the premium was not paid at a time mentioned, the company would have the right to declare a forfeiture. There was a default in paying the premium, but the company neglected to notify the insured that it would treat the policy as terminated, and, a loss subsequently occurring, the company was held to be liable.⁶⁰

⁵⁹ *McAllister v. Insurance Co.*, 101 Mass. 558.

⁶⁰ *Schoneman v. Insurance Co.*, 16 Neb. 404, 20 N. W. 284.

In *McAllister v. New England Life Ins. Co.*⁶¹ the policy was delivered to the insured and a note for the premium given to the company. The contract was complete and operative. Subsequently, the insured became dissatisfied, and declared that he abandoned the whole thing, and would have nothing more to do with the insurer. Still, he retained the policy, and the company retained the note. A loss afterwards occurring, the latter was held to be liable. This decision was based on the principle that the contract was intended to impose mutual burdens, and secure mutual advantages; that it could not be abandoned by either party without the consent of the other, except in the manner provided by its own terms. The insurer had an interest in the note which it held for the premium, and was under no obligations to relinquish its benefit, because the insured had become dissatisfied, and wished to abandon the engagement. Notwithstanding the insured's declaration that he "abandoned the whole thing, and would have nothing more to do with the company," he could not escape liability on account of his note; and this being the case the company was both morally and legally holden for the loss.

The case of *Grace v. American Cent. Ins. Co.*⁶² is here referred to because of the authority it brings to the support of two important points involved in this general discussion. The insurance was procured through a broker, to whom proper notice of cancellation was given. The policy provided, in suitable language, that any person other than the insured, who procured the insurance to be taken, should be deemed to be the agent of the assured, and not of the company. It was admitted that the plaintiff, when the loss occurred, had never received any notice of the intention of the company to terminate the risk. The opinion of the court was delivered by Justice Harlan, and it held that the provisions of the policy before referred to should not be construed to mean that the broker was agent of the assured for any other purpose than to procure the insurance; that notice to him of the defendant's intention to cancel was not sufficient. The insurance in this case was effected in the city of New York, and the defendant offered evidence, which was admitted by the trial court, against the objection of the plain-

⁶¹ 101 Mass. 558, *supra*.

⁶² 109 U. S. 278, 3 Sup. Ct. 207.

tiff, to show that there was an established custom in New York that authorized an insurance company, when desiring to terminate a risk, to give notice to the broker through whom it was procured. In reference to this proposition, the court said, "An express written contract, embodying in clear and positive terms the intention of the parties, cannot be varied by evidence of usage or custom"; quoting with approval the language of Lord Lyndhurst in *Blackett v. Royal Exch. Assur. Co.*,⁶³ that "usage may be admissible to explain what is doubtful, but never admissible to contradict what is plain."⁶⁴

In *Hathorn v. Germania Ins. Co.*,⁶⁵ the policy contained a provision permitting the company at any time to cancel by giving notice of such purpose, and refunding a ratable proportion of the premium for the unexpired term. The company elected to terminate the risk. Notice was given the assured, and the policy surrendered, but the unearned premium had not been repaid when the fire occurred. It was subsequently tendered by the company, and accepted by the insured, without knowledge of the loss, and it was held that the insurer was liable. This decision is based on the principle that the premium is an indispensable element in a contract of insurance. Without it, there will be an incompleteness in all negotiations, either to insure or to rescind. In both cases there must be either payment or waiver.

The case of *Hartford Ins. Co. v. Reynolds*⁶⁶ is not in conflict with this general proposition, although frequently referred to as supporting the doctrine that payment of the unearned premium is not an indispensable condition. Kirchofer was the authorized agent of the plaintiff in error. He had general powers; could make binding contracts of insurance; was intrusted with policies signed in blank by the officers of the company, which he had authority to fill up, countersign, and deliver to persons with whom he had made contracts to insure. Reynolds, the defendant in error, had agreed with Kirchofer that the latter should insure, and keep insured, a certain property, in the Hartford Company. In accord with this

⁶³ 2 Crompt. & J. 249.

⁶⁴ *Partridge v. Insurance Co.*, 15 Wall. 573; *Robinson v. U. S.*, 13 Wall. 365; *The Delaware*, 14 Wall. 603; *National Bank v. Burkhardt*, 100 U. S. 692.

⁶⁵ 55 Barb. (N. Y.) 28.

⁶⁶ 36 Mich. 502, 7 Ins. Law J. 214.

agreement, a policy was written by Kirchofer; and, with the consent of Reynolds, it had been retained in K.'s office. The premium was charged on the books of the latter, and subsequently paid in the settlement of accounts between K. and R. Some time afterwards, Kirchofer received instructions from the plaintiff in error to cancel the risk. This was done by returning the policy to the company without the knowledge of Reynolds. The court said: "It is no part of an insurance agent's duty to his company to look after the insurance of other persons, and all that he does in that way, beyond what relates to insuring in his own company, is outside of his business character. As the insurance broker, he represents the insured, and not the insurer; and inasmuch as there was evidence in this case which was open to the jury, even if seriously disputed, which in many things it was not, and which tended to show that Kirchofer did not exact payment of the premium when due, but kept a private account with Reynolds, who only paid when called upon, the effect of this upon the various questions in the controversy is quite important. If notice of cancellation was necessary, and if any repayment of premium was necessary to complete it, as was usually the case, it may be questionable how far such notice is required when the agent of the company is also the only agent or person with whom the company has acted on behalf of the insured. It is certainly not necessary to give notice to the principal, who deals through a broker who is notified, or to repay money to any one but the broker who pays the premium. If the jury believe that the arrangements with Kirchofer were such that he gave a personal credit to Reynolds, and at the same time arranged the premium out of his own moneys or credits with the company, then the restoration to him was a sufficient repayment; and his subsequent collection from Reynolds of the money, for which there was no existing insurance, could not have the effect of reviving an insurance that the company had canceled. To revive a canceled policy already rejected by the company would require evidence of authority in the agent to rescind or recall the action of his principal, which could not be presumed, and would also require clear proof of an understanding that that specific act was intended to be done. So far as we can determine from the record, there is an absence of proof of any such agreement, as well as any power to

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make it. We have already said that if Kirchofer was acting in the capacity of an insurance broker for Reynolds, and keeping an account with him generally in receiving specific premiums as they were due to and required by the company, his knowledge of the cancellation, and the return or credit to him by the company of the premium, would bind Reynolds. If it was Kirchofer's duty to notify persons insured, and to deal with them in cases of cancellation, the failure to do so was a breach of duty; but if he was himself the party to receive, as well as to give, notice, the company was exonerated when dealing with him as the agent of the insured, as it would have been in dealing with any other agent or person. Reynolds, by employing him in this double and anomalous capacity, directly contributed to produce the complication."

This case is easily distinguishable from that of *Grace v. American Cent. Ins. Co.*, and other analogous cases, heretofore considered, where it has been held that the broker is the agent of the insured only for the purpose of procuring the insurance. Kirchofer's agency for Reynolds was co-extensive with the business of keeping this property insured. All duties thereto he had undertaken to perform, by the appointment of his principal. Reynolds personally gave the matter no attention whatever. Kirchofer paid the premium, and retained the policy in his possession. He was the only person with whom the company dealt. Until a loss occurred, it does not appear that Reynolds so far interested himself as to inquire whether or not his agent, Kirchofer, was performing his duties with fidelity.⁶⁷

A. held policy of G. Co., which was procured through broker Z. G. Co., being dissatisfied with the risk, requested cancellation of the broker, Z. This was agreed to, and two days later Z. procured, in plaintiff's name, another policy for the same amount in the Q. Co., and the G. Co. was informed of what had been done. The property was burned a few days later, and after the adjustment the Q. Co. paid its proportion, and suit was brought to recover also of G. Co. The court said: "It may be conceded that there was no formal, technical cancellation of the policy issued by the defendant. It was in possession of plaintiffs. Defendant had not returned or offered to return to

⁶⁷ *Stone v. Insurance Co.*, 105 N. Y. 543, 12 N. E. 45.

them the premium. But was there a substitution of the liability of a third party for that of the defendant, by the consent of the plaintiffs, defendant, and the third party? Defendant's contract was one of indemnity in a fixed amount, against loss by fire on certain goods. A third party, the Queen Insurance Company, took its place, and indemnified plaintiffs against precisely the same loss, in the same amount, on the same goods, then stood by its contract, and paid the loss. This was a complete and effectual substitution of another insurer in place of defendant, and this was by the consent of all parties interested; for it is not important to discuss the exact authority of an insurance broker, as Zugschmidt was, and determine to what extent he was the agent of the insured and the insurers,—that is, where the line should be drawn. It is undisputed he acted throughout for the plaintiffs and for both companies, and communicated with both; and all consented, and ratified his acts. Nor is it controlling that there was no formal cancellation or surrender of the first policy. The plaintiffs got the policy in the Queen Company, and, what is more important, got the money upon it. The premium they had paid to the defendant, in so far as they were entitled to a return of it, is owing by the defendant, through the broker, to the Queen Company, to whom the broker, acting for plaintiffs, transferred defendant's liability. Plaintiffs ought to have surrendered for cancellation defendant's policy. What ought to have been done, equity will consider as having been done. The case is not unlike that of a creditor who has taken surety for a debt. The surety declines to be longer responsible. The debtor procures a new surety, acceptable to the creditor, who takes the place of the first on a new note. The creditor retains possession of the old note. The new surety pays the debt. The creditor sues the first surety on the old note, alleging it had never been formally delivered up or canceled. In such case the learned judge of the court below would very promptly have said that, if a creditor be once paid, his mere possession of the old note would not warrant the exaction of a second payment of the same debt. It seems to us there is no distinction between the supposed case and the one before us, except that the first is a contract for suretyship, and the second of indemnity. The injustice worked by permitting a second recovery in the one is the same as in the other. No party ought to be allowed to recover twice for the same debt, no matter how many instruments

evidencing the amount of his debt he may hold, nor how many distinct obligors there may be on them. Most creditors are content if their debt be paid once. All ought to be. We think there was error in refusing to affirm defendant's second point."⁶⁸

§ 18. The Insured, having Forfeited His Right to Recover under the Policy, cannot Demand Repayment of the Premium.

Insurance policies usually provide that the company may cancel at any time, on notice, and refunding a ratable proportion of the premium. When this occurs, it may avail itself of this option for any cause whatever, or from mere caprice.⁶⁹ There is no duty incumbent upon it to give any reason for its action. The giving of the notice required by the policy, and the refunding or tender of the unearned premium, will terminate the risk.⁷⁰ When the policy becomes void by reason of a breach of any of its conditions, that is an end of the matter, and no obligation will rest on the insurer to refund any portion of the premium.⁷¹ When the insured by his own act or neglect forfeits a right to recover under the terms of the policy, he at the same time forfeits his right to claim a rescission, and to have repayment of the unearned premium. In other words, when a policy has become void because of the violation of its conditions by the insured, he cannot afterwards demand any benefits in the matter, either of indemnity or unearned premium, for the contract has terminated by its own terms, and the premium has been forfeited. A different rule has been held in Illinois and Nebraska.⁷² If the policy never attached, by reason of any mistake that does not

⁶⁸ *Arnfeld v. Assurance Co.*, 172 Pa. St. 605, 34 Atl. 580.

⁶⁹ *Irwin v. Insurance Co.*, 2 Disn. (Ohio) 68; *International Life Ins. & Trust Co. v. Franklin Fire Ins. & Trust Co.*, 66 N. Y. 119.

⁷⁰ *Runkle v. Insurance Co.*, 6 Fed. 143; *Van Valkenburgh v. Insurance Co.*, 51 N. Y. 465; *Hollingsworth v. Insurance Co.*, 45 Ga. 294; *White v. Insurance Co.*, 120 Mass. 330; *Home Ins. Co. v. Curtis*, 32 Mich. 402.

⁷¹ *Carey v. Insurance Co.*, 84 Wis. 80, 54 N. W. 18; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; *Johnson v. Insurance Co.*, 41 Minn. 396, 43 N. W. 59; *Aetna Ins. Co. v. Maguire*, 51 Ill. 342.

⁷² *Manufacturers' & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553; *Schoneman v. Insurance Co.*, 16 Neb. 404, 20 N. W. 284.

involve fraud and evil practice, the insured will be entitled to a return of the whole premium, for none of it has been earned.⁷³ But it will be otherwise where the insurer has once become charged with a liability, and the policy is afterwards voided by the act or negligence of the insured. So, too, if the undertaking to insure does not succeed, without fault of the insurer,—as, if the risk be a building, it should be blown down, or carried away by a flood, or fall of its own weakness,—the premium will be treated as earned.⁷⁴

§ 19. Parties may Agree on Terms of Cancellation Different from Those Expressed in the Policy.

It is competent for the parties to agree on terms of cancellation independent and different from those expressed in the policy, as, for instance, where the policy provided that the company should have the right to cancel on the repayment of a ratable proportion of the premium, and it was shown that the insured had agreed with the

⁷³ Gray v. Sims, 3 Wash. C. C. 276, Fed. Cas. No. 5,729; Penson v. Lee, 2 Bos. & P. 330; Waddington v. Insurance Co., 17 Johns. (N. Y.) 23; Clark v. Insurance Co., 2 Woodb. & M. 472, Fed. Cas. No. 2,829; Friesmuth v. Insurance Co., 10 Cush. (Mass.) 588.

⁷⁴ Mount v. Waite, 7 Johns. (N. Y.) 434; Delavinge v. Insurance Co., 1 Johns. Cas. (N. Y.) 310; Furtado v. Rodgers, 3 Bos. & P. 191; Moses v. Pratt, 4 Camp. 297; Schwartz v. Insurance Co., 3 Wash. C. C. 170, Fed. Cas. No. 12,505; Hoyt v. Gilman, 8 Mass. 336; McCulloch v. Assurance Co., 3 Camp. 406; Lowry v. Bourdieu, 2 Doug. 468; Boehm v. Bell, 8 Term R. 154. See International Life Insurance & Trust Co. v. Franklin Fire Ins. Co., 66 N. Y. 119, 5 Ins. Law J. 371.

In Harris v. Insurance Co., 53 Iowa, 236, 5 N. W. 124, 9 Ins. Law J. 525, the court held, "A party cannot recover upon an insurance contract avoided by his own act, although the insurer has not offered to rescind or return the unearned premium."

In Stone v. Insurance Co., 105 N. Y. 543, 12 N. E. 45, the broker who procured the policy had been the agent of the plaintiff for several years, and had large discretionary powers in regard to placing his insurance. The premium was not paid, but charged to the broker by the defendant, in whose hands the policy remained. Notice of cancellation was given only to the broker, and no offer was made to return the unearned premium. The court held (one judge dissenting) that the notice of cancellation to the broker was sufficient to terminate the insurance. See, also, Standard Oil Co. v. Triumph Ins. Co., 64 N. Y. 85, 3 Hun, 591, 6 Thomp. & C. 300.

company before the fire occurred, and accepted \$13 as the amount of unearned premium that he was entitled to receive, although an accurate computation after the fire disclosed that the insured might have demanded a larger sum, by about 80 cents. It was held that an agreement to accept the amount named was conclusive, and that the liability of the insurer was at an end.⁷⁵

§ 20. Condition of Policy in Regard to Payment of Premium must be Strictly Performed.

Where a note is given for the premium, or a part of it, and it is, by proper stipulations contained in the policy, made a condition of its continued validity that the note shall be paid at maturity, the insurance will terminate when default is made; and no duty will rest on the insurer to give notice, or in any way to declare a forfeiture.⁷⁶ If the note is made payable at any designated place, the maker must find it there, and offer payment. Failure to do so will be at his peril.⁷⁷ If, however, the note is not accessible at the place named, when due, no forfeiture will result, although payment is not made; but it is otherwise when the note does not specify any particular place of payment. The maker himself must then seek the holder, and, failing to do so, the default will not be excused, and a forfeiture will result. Where the policy reserves to the insurer the right to cancel on notice and a refunding of the unearned premium, a tender of a ratable proportion of the premium must be made. It will not be sufficient to write the insured that "the insurance is terminated, and the company will pay such portion of the

⁷⁵ *Aetna Ins. Co. v. Weissinger*, 91 Ind. 297.

⁷⁶ Held, that premium note must be paid at maturity, unless payment is excused. Payment is in the nature of condition precedent. *Bloom v. Insurance Co.* (Iowa) 62 N. W. 810; *Union Cent. Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 455, 28 S. W. 117, and cases there cited; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. 417; *Phenix Ins. Co. v. Rollins*, 63 N. W. 46, 44 Neb. 745; *Moore v. Insurance Co.*, 90 Iowa, 636, 57 N. W. 597; *Dale v. Insurance Co.*, 95 Tenn. 38, 31 S. W. 266; *McEvoy v. Insurance Co.*, 46 Neb. 782, 65 N. W. 888.

⁷⁷ *McIntyre v. Insurance Co.*, 52 Mich. 188, 17 N. W. 781, and 13 Ins. Law J. 216; *Thompson v. Insurance Co.*, 104 U. S. 252; *Blackerby v. Insurance Co.*, 83 Ky. 574, 15 Ins. Law J. 756.

premium as he may be entitled to receive when the policy is sent in," or that he shall "call at company's office and get his money." No duty can be required of the insured, except to surrender the policy on a tender of the unearned premium being made. It is not incumbent on him to "send in the policy," or to go to the company's office to "attend to the business." The cancellation being asked for by the company, no burdens can be imposed upon the insured. He may disregard any request made by the company seeking to enforce a right that will cause him either trouble or expense.⁷⁸

In *Chadbourn v. German-American Ins. Co.*,⁷⁹ the policy was issued to the owner of the property, with loss, "if any," payable to B. Afterwards the property was sold to B, and the policy, by proper indorsement, made to recognize the change of interest, and was also indorsed payable, in case of loss, to "C.," a new mortgagee. A. had given his note for the premium, which he failed to pay. The company mailed to B. and C. a notice that they would cancel the policy if the premium was not paid on that day, or the next. This letter was received on Friday morning by one of the parties. The other, being absent, did not get the notice until some time later in the day. The premium was not paid, and on Monday morning, at about 10 o'clock, they each received (that is, B. and C.) another letter from the company, informing them that the policy was canceled, and requesting that it be returned to them, together with the premium earned. Two or three hours afterwards the property burned. The policy reserved to the company the right to cancel at its option, by giving notice and refunding the unearned premium; and the court held that it was a question for the jury whether the notice given afforded reasonable time in which the insured could act in procuring other insurance. It also intimated that the surrender of A.'s note given for the premium was precedent to rescission. From the facts stated, we think the last proposition involves a fallacy which may be dangerously misleading. It is difficult to understand in what respect the rights of the parties were complicated

⁷⁸ *Griffey v. Insurance Co.*, 100 N. Y. 417, 3 N. E. 309; *Id.*, 30 Hun (N. Y.) 299; *Peoria, M. & F. Ins. Co. v. Botto*, 47 Ill. 516; *Planters' Ins. Co. v. Walker Lodge*, 1 White & W. Civ. Cas. Ct. App. 415; *Runkle v. Insurance Co.*, 6 Fed. 143; *Mohr & Mohr Distilling Co. v. Insurance Cos.*, 12 Fed. 474.

⁷⁹ 31 Fed. 533, 16 Ins. Law J. 897.

by the note held by the company, and given by A. in payment of the premium. When the property was bought by B., the company, by suitable indorsement on the policy, consented that B. should be substituted for A. as a party to the contract. Thus, new and independent relations were established with B., while those theretofore existing with A. were wholly broken off. When B. and C. became parties to the contract,—one as owner and the other as mortgagee,—so far as they were concerned the premium was paid, and the note given by A. was a personal matter between him and the company. Either to retain or to surrender this note could in no way affect the rights of B. and C. The company could cancel for any cause, or from mere caprice, but the returning of A.'s note would not excuse it from paying to B. and C. that portion of the premium which had not been earned. The note was evidence of the debt which A. owed the company. It expressed the compensation promised by A. for the contract of indemnity granted to him, and subsequently transferred to B. and C. Presumptively, A. had arranged with B. and C. to be reimbursed; but, whether this was done or not, the obligation of parties could not in any manner be affected. The company, in consideration of A.'s note, had given to B. and C. a paid-up policy. This could not be canceled by returning the unpaid note to A., but by paying to B. and C. a ratable proportion of the premium. It was their insurance that was being canceled, not A.'s. The court, too, we think, erred in submitting to the jury the question of whether the insured had reasonable notice of the cancellation.

In this view we are sustained by the New York court of appeals in the case of *Lipman v. Niagara Fire Ins. Co.*⁸⁰ The decision is a late one, and carefully considered. The conditions of the policy in regard to cancellation differ in no essential particulars from that in the suit of *Chadbourn v. German-American Ins. Co.*, *supra*, and three hours after notice of cancellation was given the property was destroyed by fire. Among other things, the plaintiff urged that the liability of the insurer could not be terminated without reasonable notice. The court said: "It remains to consider whether, under the condition, the policy terminated *eo instanti* on notice by the com-

⁸⁰ 121 N. Y. 454, 24 N. E. 699.

pany. There is no language which postponed the effect of notice until the lapse of a reasonable time thereafter. The rule is well settled that, when a person undertakes to do an act upon notice from another, it is implied that he should have a reasonable time after he is called upon to do the thing or render the service, and, no time for performance being specified, the law gives him a reasonable time; but, where a contract fixes the time of performance, the rule of reasonable time has no application. We have been referred to no case, nor have we found any, which sustains the doctrine that, where one has assumed an obligation which is to continue until notice is given to the other party, the obligation continues after notice. * * * The contract provides that it shall be terminated on notice. We perceive no reasons why the contract should not be construed according to its terms. The parties might have provided that the risk should be carried by the company after notice for a reasonable time to enable the insured to place it elsewhere, but they did not do so; and even if a custom of that kind had been proved, which was not, it would have been inadmissible to change or extend the explicit language of the contract. We think the cancellation was effected at the time of the service of the notice.”⁸¹

§ 21. Rehearing on Certain Important Points.

When the policy clearly expresses the agreement between the parties, performance of its terms will be enforced in a court of law. When, however, the policy fails to evidence the contract made, it may be reformed in a court of equity; but there can be no reformation unless it be conclusively shown that the parties—not one, but both—intended something different from what the policy sets forth.⁸²

The conditions, requirements, and limitations of the policy, so far as they relate to the circumstances and subject of the risk, are essential parts of the contract; and it is immaterial whether or not the insured has read the policy, and knows its contents. The legal

⁸¹ *Mueller v. Insurance Co.*, 87 Pa. St. 399; *Grace v. Insurance Co.*, 16 Blatchf. 433, Fed. Cas. No. 5,648. Last case reversed on another point in 109 U. S. 278, 3 Sup. Ct. 207.

⁸² *Bennett v. Insurance Co.*, 55 N. J. Law, 377, 27 Atl. 641.

effect of the language employed to express either benefits or obligations gains or loses nothing by either the care or indifference of the insured in informing himself as to its meaning and scope. When the insured has the means of knowledge in regard to the terms of the policy he has accepted, and under which he claims loss, his neglect to carefully inform himself cannot be urged to the prejudice of the insurer, who is not in fault.⁸³

It will often be a matter of some difficulty to fix the exact point of agreement between parties who are negotiating the terms of insurance. When they proceed along different lines, or if on the same line, but showing distinct points of divergence, there will be no contract. This is illustrated in the case of *Stephens v. Capital Ins. Co.*⁸⁴ The soliciting agent who took application had no authority to issue policies or otherwise bind the company by his parol contracts to insure. The application sent in was received at the office of the company on March 10th. The policy was written and mailed to the soliciting agent on the 13th. This he received, and continued to hold when the property was burned, on the 16th. The application requested insurance against fire for \$1,540, and against cyclone for \$750. This cyclone insurance, the application contemplated, should apply to all the property included in the fire hazard; but in the policy, as written and mailed to the agent, it was made specific, and covered only a portion of the property which was the subject of the fire risk. The court held that the material disagreement between the insurance applied for and that granted showed that when the fire occurred the negotiations were incomplete, and that either party could recede from the undertaking. Certainly the applicant might have refused payment of the premium, on the ground that the policy did not furnish the full measure of indemnity he had asked for.

In *New York Lumber & Wood-Working Co. v. People's Fire Ins. Co.*,⁸⁵ the risk had been carried by the P. Co., who, a few days before the termination of the insurance, wrote a new policy to con-

⁸³ *Wierengo v. Insurance Co.*, 98 Mich. 621, 57 N. W. 833; *Thomson v. Insurance Co.*, 90 Ga. 78, 15 S. E. 652; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Albrecht v. Railway Co.*, 87 Wis. 105, 58 N. W. 72.

⁸⁴ 54 N. W. 139, 87 Iowa. 233.

⁸⁵ 55 N. W. 434, 96 Mich. 20.

tinue the old one, and forwarded same to its local agent, to be delivered to the insured as a renewal of the expiring risk. While thus held by the agent, the first policy terminated, and the property burned. The court held there was no liability; and clearly it was right, as there had been no mutual agreement to continue the insurance. There was a willingness shown on the part of the P. Co. to renew the policy, but the insured had signified no willingness on his part to accept. While an actual, physical delivery of the policy is not necessary for the completion of the contract, the undertaking should advance so far that the insured is entitled to its possession and control. When this is done, if the policy is retained by the insurer's agent, he will hold it as agent of the insured. The circumstances under which a policy is held by the agent will be considered in respect to the question of whether or not there has been a delivery.

It was held in *Newark Mach. Co. v. Kenton Ins. Co.*⁸⁶ that if the terms of the insurance have been agreed upon, and the completed contract distinctly accepted by the insured, a delivery will be presumed, and, if the policy continues in the hands of the agent, he will be construed to be the agent of the insured for that purpose. When this occurs, although the insured may never have seen his policy, he will be charged with knowledge of its contents.⁸⁷

That which is ambiguous or inconsistent in the form or language of the policy must be explained and reconciled so as to preserve good faith, and to recognize the highest intelligence of the contracting parties. The circumstances and character of the hazard must be taken into account, when forming a conclusion as to the proper construction which the language of the contract should be given. This was well illustrated in the case of *Dailey v. Preferred Masonic Mut. Acc. Ass'n.*⁸⁸ The policy was based on a written application, which fully explained that the person asking for insurance was a conductor on a passenger train. There was a provision printed in the policy that the insurer should not be liable for any injury caused by "entering or alighting from a moving train." The court held that, the occupation of the insured having been explained in the applica-

⁸⁶ 35 N. E. 1060, 50 Ohio St. 549.

⁸⁷ *Wilcox v. Insurance Co.*, 55 N. W. 188, 85 Wis. 193.

⁸⁸ 102 Mich. 289, 57 N. W. 184.

tion, it must be presumed that it was within the contemplation of the parties that the insurance applied for and granted covered all the ordinary hazards of a passenger conductor, which includes that of entering and alighting from moving trains. This case is referred to only for the purpose of illustration, and without accepting the principle of construction in any larger sense than the one in which it is applied by the Michigan court. It will be observed that in this case the application was a part of the policy, and, the two parts of the one contract being repugnant, they must be brought into agreement by construction. This the court did in the manner explained, and I think correctly; but to extend the application of this rule to embrace imputed knowledge or parol agreements would involve perils of the gravest character. Suppose there had been no written application in this instance, and admit the fact to have been known to the agent and to the company that the person asking for insurance was a conductor, and that in the performance of his ordinary duties it frequently became necessary for him to step on and off trains while in motion. Would this knowledge, in any important respect, change the relations of the parties, or create obligations outside of the written contract? If the applicant accepts the policy, he is charged with the knowledge of its contents, and bound by its terms, notwithstanding he will not be protected while entering or alighting from moving trains. The fact that this peril was known to exist does not raise a presumption that it was intended to be covered by the insurance. The general promise of indemnity on the part of the company is qualified with this particular exception. In this respect the company had a right to limit its liability. All fire insurance policies prohibit the keeping of certain articles which are regarded as exceptionally dangerous, and there are other things which are permitted to be kept, but excluded from the insurance, for reasons which are deemed sufficient. It will sometimes happen that merchandise of a different character, owned by the same person and located in the same place, will be insured at different rates, for the valid reason that articles of a particular class are so delicate or fragile that they are more seriously affected by the accident of fire than other kinds of merchandise. When this occurs, and the owner of the property is unwilling to pay the rate which the insurer demands, no wrong is done, no rule of business

or principle of law is violated, if the policy is so written as to express the attitude of the parties, and to except from the insurance such articles or classes of property as are subject to great damage from slight causes, and therefore properly chargeable with a higher rate of premium. The distinctions here are important, and it is to be regretted that they are not always carefully observed by the courts. It is the difference between reconciling the repugnant provisions of a written contract (policy and application), and the presuming of parties to have contemplated obligations where there are no evidences of their having done so, beyond the fact that "it might have been."

In *Fidelity & Casualty Co. v. Teter*,⁸⁹ the statement of facts shows that Teter, who was dealing in horses, had in contemplation a business venture that made it necessary to undertake a journey to a distant state, and, before starting, went to one Merchant, who was general agent for plaintiff company, and particularly inquired if the accident policies issued by Merchant would protect him, and cover all accidents happening, or to which he would be liable, either while caring for his horses, or traveling by the ordinary public conveyances; and, on being assured by the agent that the protection would be full in either case, Teter accepted a policy which provided that "this covers the assured only against the hazards of travel as a passenger on a public conveyance provided by a common carrier within the United States and Canada." The insured, while attending his horses, was accidentally killed. Action was brought on the policy, to recover the insurance, \$5,000. The company defended on the ground that the accident did not occur while the insured was "traveling by public conveyance," and consequently the injury was not one within the terms of the policy.

In discussing this case, the supreme court of Indiana plainly indicates that the parties to a contract must be bound by the language employed to express their agreements, when such language can have but one meaning; that it is not competent for persons entering into a contract to intend one thing, while using words importing something distinctly different. When the language of the contract is doubtful or ambiguous, then the construction put upon it by the

⁸⁹ 136 Ind. 672, 36 N. E. 283.

parties themselves should be influential in determining the construction to be given by the courts. Justice Hackney refers to *Olds Wagon-Works v. Coombs*,⁹⁰ and quotes approvingly as follows: "In interpreting a contract, the language employed therein is the exclusive medium through which to ascertain its meaning. The situation of the parties, and the circumstances under which the contract was made, may become a proper subject of inquiry, in order to arrive at the sense in which the language was employed."

Applying the rule of construction which I have here set forth to the accident policy accepted by Teter, the court said: "This contract is free from ambiguity, and is susceptible of construction by the court without the aid of extrinsic facts. Its language is clear, positive, and within the comprehension of a man of ordinary intelligence. With such contracts, the parties are bound by their contents, and are presumed to have acted with full knowledge of their proper construction." It will be observed that the court here ignores the statement made by Merchant, the general agent of the company, which was accepted by Teter, that the policy would cover and protect him against all the ordinary accidents to which he would be subject during his journey, by public conveyance, or otherwise. The court treats this as having no greater legal effect than an opinion expressed by the agent, which the insured was not bound to accept, and, however it may have influenced his judgment, in no way changed the liability of the company under the policy. The court said, "False representations as to the legal effect of a written contract do not affect such contracts."⁹¹ The principal could have been bound by no statement so palpably in conflict, not only with the plain and ordinary meaning, but also with the legal effect, of the contract."

§ 22. A Void Policy can be Revived only by the Affirmative Action of Both Parties.

When the policy stipulates that it shall become void on the happening of events particularly designated, such as change of title or control, incumbrance, other insurance, etc., it will be the duty of the

⁹⁰ 124 Ind. 62, 24 N. E. 589.

⁹¹ *Burt v. Bowles*, 69 Ind. 1; *Clodfelter v. Hulett*, 72 Ind. 137; *American Ins. Co. v. McWhorter*, 78 Ind. 136.

courts to give legal effect to such expressed intention of the parties. Stipulations of this class cannot lose their character, or cease to be vital elements of the contract, for the reason that no substantial right has been violated, or the enforcement of the stipulation would be arbitrary. The parties being competent to contract, and having done so, it will be presumed that they have acted understandingly; and, in the absence of fraud, the agreement entered into will not be considered by the courts in reference to the particular benefits or injuries to one party or the other which may result from enforcement. That is a matter which it will be presumed the insured and the insurer have determined for themselves. The courts cannot always understand the facts and circumstances which are clearly understood by the parties, and influence their judgment, at the time the stipulations are entered into. Had different conditions been insisted upon by one or the other, negotiations would perhaps have been broken off, and no contract consummated. As courts and juries cannot look into the heart of man, and discover the motive that governs conduct in particular cases, they are incompetent to decide as to the reasonableness or materiality of particular stipulations which have been made a part of the contract. The existence of such stipulations implies that they were regarded as important by the parties, who, acting wisely or not in a matter clearly within their constitutional privileges, cannot be interfered with by the courts, nor arrested in any manner, while exercising a right fundamental and paramount,—the right to make contracts concerning the ordinary affairs of life.

Judge Jackson, of the United States supreme court, in the case of *Imperial Fire Ins. Co. v. Coos Co.*,⁹² said: "For a comparatively small consideration, the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer therefore may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover the insured must show himself within those terms.

* * * It is immaterial to consider the reasons for the conditions

⁹² 14 Sup. Ct. 379, 151 U. S. 452.

or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms and conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their functions and duty consist simply in enforcing and carrying out the one actually made."

There are no carefully considered cases where a different principle of law has been applied, or seriously contended for. The courts have been often called upon to construe, but never to annul, a contract made by the parties in interest, and to substitute one of their own creation. When contracts are unskillfully formulated, or expressed in obscure and ambiguous terms, there will sometimes exist a reasonable doubt as to what was intended. The settlement of this question is the duty of the courts. Its wisdom may be employed to define the meaning of words and sentences. When this is done, the contract will be enforced, consistently with the interpretation or construction given.

There is another class of cases which has produced much confusion, and has unsettled opinions where careful distinctions have not been observed. It has been often held—and correctly, too, I think—that an insurance company cannot insist upon forfeitures, under the terms of its policy, by reason of facts of which it had knowledge when the policy was issued. In these decisions I find nothing inconsistent with the law as set forth by Justice Jackson in the case above referred to. The courts properly proceed upon the theory that the parties cannot be presumed to have contemplated an insurance that did not insure. They assume that the parties to a contract did act with good faith, and with an intelligent understanding of the obligations mutually undertaken; but it is found that the insured has paid a premium, and received from the insurer a form of contract which by its own terms is void from the beginning. One party has given a consideration, and the other party has taken it; but the first receives no promise, and the last assumes no duty. It being recognized that the law of compensation governs in all business engagements, the presumption here arises that the policy does not accurately express the agreement of

the parties; and in such cases parol testimony is permitted to support estoppel, show waiver, or even to reform the contract.

In *Imperial Fire Ins. Co. v. Coos Co.*, the policy expressed a condition that it should be void and of no effect, if without notice to the company, and permission therefor indorsed in writing on the policy, mechanics should be employed in building, altering, or repairing the premises. It was in evidence, and not disputed, that mechanics had been employed on the premises for a period of five or six weeks, and considerable changes had been made in the arrangement of partitions, floors, heating apparatus, etc., and that carpenters, masons, painters, and plumbers had been thus engaged without the knowledge of the insurer; but it was conceded that the work had been completed, and the last of the mechanics had retired, a few hours before the fire occurred. The insurer contended that it was wholly immaterial whether the hazard had been so changed on account of the improvements made as to increase the risk; that the conditions of the policy had been violated by the employment of mechanics on the premises without its written permission, and that the agreed effect of such violation was to relieve the insurer from its promised contingent liability; and that, the policy having become void when the reconstruction of the building was entered upon, it did not revive when the work was completed. And this was the view of the matter taken by the court. It said: "These provisions are not unreasonable. The insurer may have been willing to carry the risk at the rate charged and paid, so long as the premises continued in the condition in which they were at the date of the contract; but the company may have been unwilling to continue the contract under other and different conditions, and so it had a right to make the above stipulations and conditions on which the policy or contract should terminate." The court, further discussing the different views contended for, explained that the question of materiality was no element of the conditions on which the forfeiture was based; that it was competent for the parties to agree that the continuance or failure of the contract should not depend upon facts and opinions difficult to determine, and concerning which vexatious controversies were likely to arise. They could make an arbitrary rule,—one that would be free from doubt, and easy of application. It said, "The violation

by the assured terminates the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition."

In *Frost's Detroit Lumber & W. W. Works v. Millers', etc., Ins. Co.*,⁹³ the policy provided that all ordinary repairs could be made without prejudice, but that if the building insured be altered, added to, or enlarged, due notice must be given, and consent obtained. The building insured was afterwards, and during the term of the policy, without knowledge of the insurer, substantially enlarged; and the court held that there could be no recovery, although the risk had not been increased.

So, too, in *Mack v. Rochester German Ins. Co.*⁹⁴ the policy stipulated for a forfeiture if, without notice to and consent of the company, mechanics should be employed, making changes or repairs in the building covered. At the time of the fire, workmen were engaged on the premises, contrary to the provisions of the policy. The court said: "These conditions, when plainly expressed in the policy, are binding upon the parties, and should be enforced by the courts if the evidence brings the case clearly within their meaning and intent."

In deciding the case of *Imperial Fire Ins. Co. v. Coos Co.*, *supra*, the court referred with approval to *Kyte v. Commercial Union Assur. Co.*⁹⁵ The provision of the policy there was that it should become void if, without consent, the circumstances of the risk should be so changed as to increase the hazard, or if there should be kept on the premises such articles as were prohibited by statute. Afterwards, intoxicating liquors were kept and sold, in violation of law. This use of the premises, however, was discontinued before the property was burned, but the court held that this fact did not relieve the forfeiture. It said: "The contract of insurance depends essentially upon an adjustment of premium to the risk assumed. If the assured by his voluntary act increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. * * * An increase of risk, which is substantial, and which is continued for a considerable period of time, changes the basis upon which the contract of insurance arises; and since there is a provision that in case of an increase of risk which is consented to or known

⁹³ 37 Minn. 300, 34 N. W. 35.

⁹⁴ 106 N. Y. 560, 13 N. E. 343.

⁹⁵ 149 Mass. 116, 21 N. E. 361.

by the assured, and not disclosed and the assent of the insured obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase.”⁹⁶

In *New v. German Ins. Co.*⁹⁷ there is a distinct recognition of the rule that, when a policy is once void, it will continue so until there has been such affirmative action by both parties as will be equivalent to the making of a new agreement. The property in this case had been sold, and the policy assigned to the purchaser, and afterwards forwarded to the company for its assent to the assignment. This was not given, and the policy was returned to the assignee, who did not observe that consent had been withheld, and laid the policy away until after the property was burned. Action to recover on the policy was based on an alleged waiver. It was held that waiver could not have the effect to restore a contract that was actually void. If the violated stipulation made the promise of indemnity, or obligation to pay a loss, only voidable, then waiver would be sufficient to save a forfeiture. The court very pertinently said, “A void contract is incapable of being inspired with legal validity except by some act equivalent in effect to a new execution.”⁹⁸

⁹⁶ *Lyman v. Insurance Co.*, 14 Allen (Mass.) 329.

⁹⁷ 5 Ind. App. 82, 31 N. E. 475.

⁹⁸ 1 May, Ins. (New Ed.) 126; *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486, at page 488; *Brink v. Insurance Co.*, 70 N. Y. 593.

In case last cited the court said: “When the assured has lost all right under the policy, and the insurer has become absolved from all liability, the assured cannot by his own act restore the contract, or reimpose a liability upon the insurer. That can only be done by a new agreement, founded upon a new consideration.” *Ferree v. Trust Co.*, 67 Pa. St. 373; *Fabyan v. Insurance Co.*, 33 N. H. 203; *Moore v. Insurance Co.*, 62 N. H. 240; *Shepherd v. Insurance Co.*, 38 N. H. 232.

When the obligation of a contract is at an end because its terms and conditions have been broken by the insured, there is no duty resting upon the company to declare a forfeiture, or to return the unearned premium. *Carey v. Insurance Co.*, 54 N. W. 18, 84 Wis. 80.

§ 23. The Divisibility of the Contract an Unsettled Doctrine.

The contract of insurance is generally held to be indivisible. In several states there has been a departure from this rule, and the policy is treated as separable, when written to cover on different subjects in specific sums; and, when there has been an avoidance as to one of these subjects, the liability of the company will continue unimpaired as to the remainder of the policy. Elsewhere the rule has been enforced that the contract is entire when the premium is in one sum, and indivisible without judicial inquiry, and a resort to involved and complicated computations.

Mr. Parsons states the rule concisely to be, "If the consideration be single, the contract is entire." This statement of the law is sustained by all the text writers, and, besides, has the support of many decisions emanating from courts of great learning and wisdom. As we have before pointed out during the progress of this discussion, the insurance contract, in many respects, is *sui generis*. Circumstances will sometimes arise when the ordinary rules of construction will impose hardships, and involve mischievous consequences that are unnecessary, and were not within the contemplation of the parties when the undertaking was entered upon. Courts have generally recognized this fact, and have given to their interpretations a freedom and elasticity which have been found necessary to protect litigants, and to save forfeitures and secure a faithful performance of contract obligations. There is, perhaps, no class of contracts to which the principle of entirety should inhere with greater persistency than to that of insurance. A familiar illustration will make the truth of this proposition apparent. B. owns a mercantile building and stock. Both are insured in one policy,—each, we will suppose, for \$5,000. Subsequently B. procures another insurance on the stock, for a sum greater than its value. The second policy is obtained without the knowledge of the first insurer, and in violation of the terms of its policy. The excessive insurance attaches a moral hazard to the whole property. The diminished interest of the owner in protecting the property, if honest, and the increased temptation to burn it, if dishonest, involve, to precisely the same extent, the

risk on the building as it does that on the stock. Now, if the contract is held to be separable, and that portion which relates to the stock void on account of the other insurance, while the part covering on building continues valid, a wrong is done the insurer, in depriving him of the conditions of security which he had carefully provided for by the terms of the policy. So far as the circumstances of the hazard have been changed, it is wholly immaterial whether the additional insurance was placed on the stock, or on the building. That which affects the moral hazard and increases the perils of one increases in exactly the same degree the perils of the other.

The supreme court of Nebraska, in the case of *State Ins. Co. v. Schreck*,⁹⁹ states a view of this matter which we think cannot be sustained on either a logical or equitable basis. The policy there covered both the building and contents, each being insured in specific sums. The real estate, after the insurance was placed, became mortgaged, in contravention of the terms of the policy; and the court held that there was an avoidance as to the building, and that the company could not be required to pay, "as it had so stipulated, for certain implied valid reasons." That is, as may be supposed, because the diminished interest which the insured would have in the property on account of the mortgage would lessen his vigilance and care in protecting the building against accident from fire; and then, as if to snatch the chattels insured by the policy "as a brand from the burning," the court adds, "Now, it cannot be contended that the fact of mortgaging the real estate could in any degree affect the risk, so far as the personal property is concerned." This proposition is not warranted in practical experience. As certainly as the cargo goes down with the ship at sea, there is loss or damage to personal property contained in buildings when the buildings themselves are the subject of loss. It is indisputably true that chattels are sometimes removed from burning stores and warehouses, but experience demonstrates that, in a large proportion of cases, stocks burn with the building in which they are contained; and, when their removal is possible, it is generally incomplete, and always attended with loss and damage. Many classes of stocks, on account of their fragile and inflammable character, pay higher rates of insurance than the build-

⁹⁹ 27 Neb. 527, 43 N. W. 340.

ings in which they are contained. Generally, the building and its contents should be considered as one risk. The position taken, therefore, by the Nebraska court, is clearly illogical, and cannot find support in the reasons given.

In *McQueeney v. Phenix Ins. Co.*¹⁰⁰ is found a careful and exhaustive discussion of the question under consideration. The Phenix Company insured two dwellings under one policy. They were situated about 30 feet apart. One was insured for \$400, and the other for \$600. The policy contained a clause as follows: "If, during this insurance, the above-mentioned premises should become vacant or unoccupied, or if the occupation or possession of such premises is changed, except as herein specially agreed to in writing upon the policy, then and from thenceforth, so long as the same shall continue vacant and unoccupied, or shall be so appropriated, applied, or used, this policy shall cease, and be of no force and effect."

One of the dwellings at the time of the fire, it was admitted, was occupied; in the other no one was living. The insurer acknowledged liability and paid the loss on the dwelling that was inhabited, and claimed that the policy was void as to the other. The plaintiff contended that the two houses were a part of the same premises insured by one indivisible contract, and that, as the insurer acknowledged its liability for the loss on one building, it could not properly refuse payment for the other, and the court so held. We quote from the opinion the conclusions reached by the court, and its reference to authorities examined: "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items."¹⁰¹

"In the case of *McClurg v. Price*,¹⁰² it is said: 'If the consideration is single, the contract is entire, whatever the number or variety of the items embraced in its subject.' Our attention is called to no case in which the correctness of this statement of the general rule is denied or questioned. It has been stated and approved by many authors and courts, but it is said that 'a policy of insurance

¹⁰⁰ 52 Ark. 257, 12 S. W. 498.

¹⁰¹ 2 Pars. Cont. 519; *Johnson v. Johnson*, 3 Bos. & P. 162; *Miner v. Bradley*, 22 Pick. (Mass.) 457.

¹⁰² 59 Pa. St. 420.

is a contract so different from those in which these general rules have been laid down that it is doubtful whether they can be applied to this peculiar contract, or in what manner the application of them should be made.'"¹⁰³ The court then proceeds to say: "In what the difference consists, or why those general rules which the wisdom of our jurisprudence has formulated to govern in the consideration of contracts should not be applied in construing insurance policies, is not stated, nor apparent to us. We can see no good reason why a contract which, if made between individuals, would be entire, should be held divisible if made between an individual and an insurance company."¹⁰⁴

¹⁰³ *Quarrier v. Insurance Co.*, 10 W. Va. 530.

¹⁰⁴ When the policy covers on separate subjects, each will be regarded as a distinct insurance, and the company discharged as to one may be held as to another. *Trabue v. Insurance Co.*, 25 S. W. 848, 121 Mo. 75.

When policy insures specifically different subjects, it is severable, and admits of being separately executed. *Kansas Farmers' Fire Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983.

This view is sustained by the courts of last resort in the states of Maine, Massachusetts, Pennsylvania, Maryland, Virginia, Wisconsin, Michigan, and Minnesota. It receives support from the courts of New Hampshire and Vermont, although not expressly approved by them, and the supreme court of West Virginia held the contract entire. *Dole v. Insurance Co.*, 51 Me. 472; *Richardson v. Insurance Co.*, 46 Me. 394; *Friesmuth v. Insurance Co.*, 10 Cush. (Mass.) 587; *Kimball v. Insurance Co.*, 8 Gray (Mass.) 33; *Lee v. Insurance Co.*, 3 Gray (Mass.) 583; *Gottzman v. Insurance Co.*, 56 Pa. St. 210; *Trustees of Fire Ass'n of Phila. v. Williamson*, 26 Pa. St. 196; *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165; *Bowman v. Insurance Co.*, 40 Md. 620; *Moore v. Insurance Co.*, 28 Grat. (Va.) 508; *Hinman v. Insurance Co.*, 36 Wis. 159; *Schumitsch v. Insurance Co.*, 48 Wis. 26, 3 N. W. 595; *Aetna Ins. Co. v. Resh*, 44 Mich. 55, 6 N. W. 114; *Plath v. Association*, 23 Minn. 479; *McGowan v. Insurance Co.*, 54 Vt. 211; *Baldwin v. Insurance Co.*, 60 N. H. 422; *Bryan v. Insurance Co.*, 8 W. Va. 605.

Opposed to this view, we find discussions of the courts of last resort in the states of New York, Missouri, Kentucky, and Nebraska, and the decision before referred to (*Quarrier v. Insurance Co.*, *supra*); *Merrill v. Insurance Co.*, 73 N. Y. 462; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9; *Koontz v. Insurance Co.*, 42 Mo. 126; *Loehner v. Insurance Co.*, 17 Mo. 247; *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340.

The force of the Kentucky case is much impaired by the fact that it relied on the case of *Clark v. Insurance Co.*, 6 Cush. (Mass.) 342, which has never been followed in its own state, but impliedly overruled in several

"The case of *Merrill v. Agricultural Ins. Co.*, supra, is based upon the fact that there was a separate valuation of the subject of insurance. It is more reasonable, we think, to hold that the sole effect of the apportionment of the amount of insurance to the different subjects insured is to limit the extent of the insurer's risk upon each item to the amount named. It cannot be said to make a several contract as to each subject of insurance; for a consideration is necessary to each contract, and, the consideration being in gross, there is no way to apportion it to the several contracts so as to sustain each by its proper consideration."

We may illustrate the application of this doctrine of the entirety of the contract in another way. The plaintiff in the case under consideration contended that the defendant, having acknowledged liability on account of payment of the loss sustained by the burning of one of the dwellings, was estopped from denying liability as to the other, the contract being inseparable. If admitted to be valid in part, it would follow, as a matter of law, that it was valid in whole. This proposition suggests a different problem, but one of no greater difficulty than would be presented by stating in the reverse form in which it is generally applied the rule, "Void in part, void in whole." What, then, under a state of facts such as the *McQueeney* Case presents, would have been the rights of the parties had the defendant company refused to pay for either dwelling on the ground that the contract was entire, and that the avoidance as to one of the buildings on account of the vacancy caused a forfeiture as to both? The logical conclusion is that, if the case had been brought to the consideration of the court in this form, the insurer would have been discharged.¹⁰⁵

later cases. The New York supreme court had held such contracts entire before the case of *Merrill v. Insurance Co.*, supra, was decided. *Smith v. Insurance Co.*, 25 Barb. (N. Y.) 497. And since then the superior court of the state has held such a contract entire. *Herrman v. Insurance Co.*, 45 N. Y. Super. Ct. 402.

¹⁰⁵ The divisibility of the insurance contract was before the supreme court of Indiana in the case of *Geiss v. Insurance Co.*, 123 Ind. 172, 24 N. E. 99. The defendant company had issued to plaintiff its policy for \$1,000, covering in specific sums on several subjects, among which was a soda fountain insured for \$350. It was shown that plaintiff was not the owner of the soda fountain,—a fact which was not disclosed to the defendant when

At this time there are not many questions involved in the litigation of insurance cases that are more abstruse, or give more trouble to the courts, than that of the unity or divisibility of the contract. Until quite recently, the decisions have shown a concurrence of opinion.

the insurance was effected. The policy contained a stipulation, in substance, that, if the insured was not the sole and unconditional owner of the property insured, the policy should be void. The court said: "It follows, as a matter of course, as applied to that item of property the policy was void. The question is, can it be upheld as respects the other separate and distinct classes of property? In *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137, the conclusion was reached that where property covered by a policy of insurance, although consisting of separate items, constitutes substantially one risk, and is necessarily subject to destruction by the same conflagration, then, even though separate amounts of insurance be apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible the contract must be treated as entire, and any breach of a stipulation which renders the policy void as to a part affects the other items in the same manner. * * * The court cannot say that the insurance company would have insured the soda fountain if the true state of the title thereto had been disclosed, nor can we say that it would have insured the other items or classes of property without insuring the soda fountain. The contract was entire and indivisible, and to hold the company liable would be to enforce upon it an obligation which it never entered into. * * * Where the validity of the insurance is made to depend upon the assured being the absolute and unconditional owner of the true title of the property insured, a failure to set forth the title with substantial accuracy renders the policy void, not only as to the property, the title to which is not truly represented, but all other property covered by the same policy, and subject to the same risk." *Wilbur v. Insurance Co.*, 10 Cush. (Mass.) 446; *May, Ins.* § 287.

In *Havens v. Insurance Co.*, *supra*, the policy covered in separate sums on an hotel building, and the furniture therein. Another policy was taken out in the Phenix on the building, without notice to the first insurer, and in violation of the terms of its policy. The court held that the contract was inseparable, and there being an avoidance as to the building, on account of the other insurance, there could be no recovery for loss on furniture.

The case of *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, is referred to as an authority sustaining the doctrine that the insurance is separable when several subjects are covered in specific amounts. The facts necessary for an understanding of the points presented are stated in the opinion of the court substantially as follows: Anna Spankneble was a married woman, who owned a brewery which was insured under the policy in suit. The policy provided against alienation, in the following manner: "In case of

Some one, having more or less wisdom than others, or perhaps having more courage, or less respect for authority, recognizing that a contract must be understood in reference to the purpose for which it was made, ventured upon a departure; and thereupon the question be-

any sale, alienation, transfer, conveyance, or change of title in the property insured by this company, or of any interest therein, such insurance shall be void and cease." It was claimed by the plaintiff in error that the building and the boiler, which were insured in separate sums, had been sold to one Klausen, but the court was of the opinion that the evidence did not support this conclusion. There was some testimony tending to prove that the husband of the insured had undertaken to sell the property as alleged, but, whether such was his purpose or not, the evidence failed to establish the fact of its accomplishment. The court said: "It nowhere appears that a valid sale of the house was made. It does not appear that such an instrument was executed as would pass title, nor was it severed from the freehold of which it was a part. Again, from an examination of the husband, although he admitted it to be a sale, still, taking his testimony altogether, we are satisfied that the bill of sale, as he calls it, was only intended as a mere security. This is rendered more apparent because he says Klausen came to him afterwards, and asked him how much he must have for the boiler; and, on being informed, Spankneble sold it. If it had been his, why ask the former owner how much he must have on the sale? Again, the policy was to the appellee, and there is no pretense that she ever sold, or authorized the property to be sold; and surely a policy containing such a condition cannot be defeated by a stranger to the transaction, nor should it be by the husband, whose right to sell and dispose of the wife's realty is not recognized." Having thus reviewed the evidence, and reached the conclusion that there had been no sale, and consequently no violation of the terms of the policy that would cause an avoidance, the court adds: "It will be observed that the various articles of property were separately insured, and on this boiler there was \$500 risk named, and separately specified. Under such a policy, even if the condition related to the personalty, it would be a fair and reasonable construction to say that the sale named in the condition referred to each item of separate insurance, and that the sale of one class separately insured would not affect the other. But the clause under consideration obviously relates alone to the real estate. It refers to sale, conveyance, alienation, transfer, or change of title in the property insured; but, if such is not the true construction, as the boiler was alone sold it only renders the insurance on it void."

From the statement here given, it appears clearly that the question of the divisibility of the contract was not, in the mind of the court, a consideration of any importance in the formation of its judgment concerning the rights of the parties. It declares its opinion, without qualification, that

came unsettled, and an open subject for discussion. Now there are widely-opposing opinions, and many difficulties are encountered in giving to the diverse constructions of the courts the support of valid reasons. In New York, Nebraska, Kansas, and several other states, it has been held that where a policy covers on building and contents in separate sums, and where the policy provides that, if the property shall be mortgaged without notice, it shall become void, an incumbrance upon one subject will not discharge the company as to the other.* In other jurisdictions it has more frequently been held that

the condition in regard to alienation referred only to the realty, and, as the sale was only of personal property, no forfeiture had resulted. What was said, therefore, in regard to the divisibility of the contract, will be entitled to no greater weight or influence than obiter dicta. As no substantial interest was involved in this view of the subject, as no rights were being determined, it is fair to suppose that the court did not intend that the declaration of opinion concerning this proposition of law, which, while not wholly irrelevant, was immaterial, should be regarded as authority in other and subsequent cases.

The same court, in *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, again intimates that the contract may be considered as separable where two buildings are insured in specific sums in one policy. In that case, too, the point was not vital, and the reference to the question was wholly incidental. It does not appear, therefore, that the Illinois court has ever directly passed upon the question of the entirety of the insurance contract.

When, under the form of the statutory policies generally in use, separation is possible, and a forfeiture comes to exist in respect to one subject, there will be a forfeiture in regard to all. *Martin v. Insurance Co.* (N. J. Sup.) 31 Atl. 213.

It was a condition that the entire policy should be void if the subject of insurance "be a building, and stand on leased ground," etc. The policy covered a building and machinery. The supreme court of Texas held that the policy must be literally construed, and that, as only a part of the subject insured was a building, the forfeiture did not occur. *Hibernia Ins. Co. v. Bills* (Tex. Sup.) 29 S. W. 1063.

If the risk be an entirety, any change that will avoid a part will avoid the whole. "Thus, if a portion of the property be mortgaged, or additional insurance be taken upon it, or if the title or ownership of a portion be changed, without the consent of the insurer, such changes affect the entire risk, and cause a forfeiture." *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 41 N. E. 847.

* *Merrill v. Insurance Co.*, 73 N. Y. 452; *Insurance Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711; *Insurance Co. v. York*, 48 Kan. 488, 29 Pac. 586.

a different rule prevails, under precisely the same state of facts.† The first of these classes of decisions wholly ignores the only consideration for stipulating that the company shall be relieved from the payment of the loss when the property is mortgaged. It will be understood, of course, that the provision in regard to incumbrances relates to what is known as "a moral hazard," which comes to exist when the interest of the insured is lessened or qualified by the inhibited mortgage so as to diminish his concern for, and watchfulness in protecting, the property insured. When the policy attaches to a building and to its contents in separate sums, and an incumbrance is placed upon either one or the other, the reason for the stipulation is the same as it would be if the incumbrance included both subjects alike, for the excellent reason that, if the incumbrance on the contents creates a moral hazard as to that subject, the building is also involved. And so, too, if the mortgage on the realty has the effect to lessen the insured's care in its protection, then the hazard on the contents is also increased. But it is different in the case of two buildings (if not exposing one another), when insured specifically in the same policy, one being mortgaged and the other not. The indifference of the owner, because of his lessened interest in regard to the preservation of one, would not necessarily extend to, and increase the moral hazard of, the other part of the risk. The same reasons, therefore, why the first policy should be regarded as entire, do not exist in reference to the last; but the courts, in applying a general rule, do not often take into consideration the different circumstances which each case presents, and frequently it would not, perhaps, be entirely proper for them to do so. It will be conceded that, when the motive of the parties does not appear conclusively in the contract itself, the courts will not be justified in going outside to find one; but when it is obvious that the intention of the insurer was to stipulate for that vigilance in the care and pro-

† *Friesmuth v. Insurance Co.*, 10 Cush. (Mass.) 587; *Gottzman v. Insurance Co.*, 56 Pa. St. 210; *Bowman v. Insurance Co.*, 40 Md. 620; *Hinman v. Insurance Co.*, 36 Wis. 159; *Plath v. Insurance Ass'n*, 23 Minn. 479; *Baldwin v. Insurance Co.*, 60 N. H. 422; *McGowan v. Insurance Co.*, 54 Vt. 211; *Garver v. Insurance Co.*, 69 Iowa, 202, 28 N. W. 555; *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137; *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, and 18 Atl. 324; *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379; *Hollaway v. Insurance Co.*, 121 Mo. 87, 25 S. W. 850; *Id.*, 21 Ins. Law J. 379.

tection of the property which can arise only from a substantial, personal interest, the courts cannot, in the performance of their duties, disregard the fact. A distinguished jurist once said: "The judges ought to be curious and subtle to invent reasons and means to make acts effectual, according to the just intent of the parties. They will not, therefore, cavil about the propriety of words, where the intent of the parties appears, but will rather apply the words to fulfill the intent, than to destroy the intent by reason of the insufficiency of the words."

Recently the appellate court of the state of Indiana, where it has been uniformly held that the insurance contract is entire, had under consideration a policy that provided that, if the property insured became incumbered without notice to the company and its consent obtained, a forfeiture should occur. A part of the property insured, subsequent to the attaching of the policy, became mortgaged, but the court decided that there could be no forfeiture under such a provision unless the whole property insured was incumbered.¹⁰⁶ This case is referred to as a curious instance of judicial differentiation, and a doubtful application of the doctrine of the indivisibility of the insurance contract. Invoking the common rule that the law abhors forfeitures, the court establishes another rule, by which the validity of the contract can be maintained without departing from the principle of construction to which the courts of Indiana for a long period have been committed.

There is a late case from the court of appeals of Virginia (Connecticut Fire Ins. Co. v. Tilley),¹⁰⁷ where 16 tenement houses were insured under one policy, there being \$187.50 written on each. The policy in that suit contained the usual clause in regard to avoidance in case of vacancy. At the time of the fire, eight of these houses were vacant; the others were occupied. The plaintiff contended, consistently with the doctrines held by the supreme court of Arkansas, that half of the buildings being occupied, and the policy being entire, there was no avoidance as to any of the buildings. On the other hand, it was claimed by the defendant that the policy being inseparable, and one-half of the buildings being vacant, and a for-

¹⁰⁶ Phenix Ins. Co. v. Lorenz, 7 Ind. App. 266, 33 N. E. 444.

¹⁰⁷ 88 Va. 1024, 14 S. E. 851.

feiture as to such, there was an avoidance as to all. But the Virginia court thought differently, and held that the amount written on each building was a separate and distinct insurance; that the indemnity was good as to such buildings as were occupied, and void as to others. We think this decision substantially just to both parties, and in no wise conflicting with legal rules. There were 16 different and distinct risks, all written, as a matter of convenience, in one policy. Had the court held that the contract was inseparable, it would have been compelled, from the logic of circumstances, to decide that the policy was void as to all the buildings, including those occupied, or valid as to all, including those that were vacant. This would have involved a gross injustice to one party or the other, and in no way have given legal effect to the well-understood intent of the contract.

§ 24. Parol Evidence Inadmissible to Vary the Terms of a Written Contract.

The evidence of a contract, when completed, cannot exist partly in writing and partly in parol. It must be wholly either one or the other, and if in writing, in the absence of fraud or mistake, parol testimony will not be received to change or vary its terms. All previous and contemporary agreements, the law will presume, have been merged in the written instrument. This rule of law is very old, and, as an early writer has said, "it hath long guided the wisdom of the courts." The rule was formed to prevent fraud, and to establish the verity of contracts on the basis of the highest possible character of evidence. It recognizes the infirmities of the memory, and the common desire of dishonest persons to enjoy the beneficial stipulations of a contract, and to be relieved from those that are burdensome. In many contracts into which persons enter, there are elements of uncertainty and chance; there are involved the possibilities of both gain and loss. The risk of performance is compensated in the promise of advantage. The result of the undertaking may show mutual profit, or there may be a gain to one party, and a loss to the other. It will often occur that a strong temptation will be presented to one or the other of the parties to a contract to escape from the obligations they have assumed, and en-

deavor to substitute others that will be less onerous. This would become possible, through fraud and perjury, were it not for the application of an inflexible rule that the terms of a written contract cannot be changed by parol testimony. When the parties have reduced their agreements to writing, the instrument presumptively expresses with greater precision their intentions at the time than the subsequent recollections of either of the parties. The writing of a contract implies deliberation and care in defining its terms and obligations. The understanding of the parties will ordinarily become clear and fixed in the process of elaboration, and in the definite statement of written language. If, therefore, the negotiations have not resulted in the parties perfectly understanding one another, the supposed agreement has now taken precise form; and, if not accurately expressing their intentions, it may be corrected; and the law presumes such will be the case, and the verity of the written instrument cannot be disputed, in the absence of fraud or mistake. An old law writer has very properly said, "The natural inclination to rely on the memory for what transpired is born of a desire to have the contract other than what it is."

In the case of *Hartford Fire Ins. Co. v. Webster*,¹⁰⁸ there was a stipulation in the policy that it should be void if the property insured became vacant, and so continued for a period of more than 30 days, without immediate notice to, and consent of, the company. The evidence showed that such vacancy had occurred, and that notice of the fact had not been given as provided. The insured testified that he did not notify the company of the vacancy, because the agent from whom he obtained the policy told him that it was not necessary to do so. The trial court instructed the jury that "the neglect of Webster to give notice of the vacancy of the premises for more than thirty days would not vitiate or void the policy, if the jury believed from the evidence that the defendant, or its agent, waived such notice at the time the policy was issued, or at any other time before the loss." Justice Scholfield, of the supreme court, said: "This instruction is clearly erroneous, and should not have been given. No principle of law is better settled than that the evidence of a contract cannot exist partly in writ-

ing, and partly in parol. Whatever may have been said in reference to the contract between the parties at the time of, or prior to, its execution, after it was reduced to writing parol evidence was inadmissible to enlarge, modify, or contradict its terms as expressed in the written instrument." The court then marked an important distinction, which is frequently lost sight of, by adding: "The parties might, undoubtedly, by a subsequent agreement, modify or enlarge its terms by parol. * * * What was relied on as an excuse for not complying with its terms was said when the contract was being made, and is directly contradictory to it, as evidenced by the policy."

This decision from the Illinois court aptly illustrates the rule as applied to insurance cases. Where the parties have expressed their agreement in writing, the law will presume that it has been done according to their understanding at that time, and will not allow parol testimony to alter or contradict the written instrument. The rule relates, in its application, only to evidence of what the contract was when completed by the assent and agreement of the parties, and forbids either of them showing by parol that it was something different. Legal presumptions will go no further in support of the verity of the written instrument, for it is competent for the parties, by subsequent parol agreements, to limit or extend, or even abrogate, the entire contract. The law will not prevent persons who agree in writing to-day from agreeing to something entirely different, by parol, to-morrow. Such restrictions of the liberty to make contracts would be an unwise abridgment of personal rights, and contrary to public policy.

In the case of *Hartford Fire Ins. Co. v. Davenport*¹⁰⁹ the policy provided that it should be void if the property should remain unoccupied for more than 15 days; and it was held that the condition was not waived by the agent's consent, prior to the issue of the policy, that it might remain unoccupied; that a written contract cannot be varied by a previous or contemporaneous oral promise. We quote from the opinion as follows: "In this case the vacancy concerning which the parties conversed, if there was any such conversation, was one contemplated in the future; and the stipulation or understanding, if it amounted to anything, was an executory contract, intended to form

¹⁰⁹ *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609, 7 Ins. Law J. 228.

a part of the contract of insurance. This being so, the doctrine cannot be admitted that any part of the contemplated contract can rest in parol. The policy was the conclusion of the bargain, and its acceptance would exclude any parol promises inconsistent with it."

The supreme court of Wisconsin, in the case of *Herbst v. Lowe* (Cassoday, J., delivering the opinion of the court), said: "The rule is universal that, in the absence of fraud or mistake, proof of antecedent or contemporaneous verbal agreements between contracting parties cannot be received to alter or control their written agreements.¹¹⁰ This is on the theory that all prior negotiations are either merged in, or excluded by, the contract finally made. The same is true in respect to any prior preliminary agreement, in so far as it is covered by, or in conflict with, the final contract."

In *Walker v. State Ins. Co.*,¹¹¹ the action was to collect a note given to the defendant company for a premium on a policy of insurance. Walker, the plaintiff in error, defended on the ground that there was no consideration, and that there was fraud and deceit in procuring the note; that the insurance was intended to cover certain stock which Walker owned, but that the agent of the insurer had filled up the application in such a manner that the stock intended to be insured was not mentioned, or in any way included, in the policy subsequently written and delivered. While the plaintiff in error admitted that he had the application in his hands, and might have read it, he claimed that he had not done so, and that he had been misled and defrauded by the act of the agent of the company. The court said: "There is no pretense but what the defendant [below] could have read the application before he attached his signature to it, if he had desired to do so. * * * It was in evidence that the defendant [below] received his policy, and retained it for some months before he made any objections to it. * * * The court properly excluded the evidence by which it was attempted to vary and contradict the statements of the written application."

¹¹⁰ *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Hooker v. Hyde*, 61 Wis. 208, 21 N. W. 52; *Oiler v. Gard*, 23 Ind. 212; *Vanderkarr v. Thompson*, 19 Mich. 82; *Kerr v. Calvit*, 12 Am. Dec. 537; *Whitney v. Smith*, 33 Minn. 124, 22 N. W. 181.

¹¹¹ 46 Kan. 312, 26 Pac. 718.

In *Frost's Detroit Lumber & W. W. Works v. Millers', etc., Ins. Co.*,¹¹² a very important enlargement of the mill insured was made in contravention of the terms of the policy; and plaintiff undertook to show by parol testimony that the enlargement of the building was in contemplation, and understood by the insurer, at the time the policy was issued. The supreme court of Minnesota said, "As we understand the facts sought to be shown, the proof was incompetent under the rule which forbids oral evidence to vary the terms of a written contract."

Best, in his *Principles of Evidence*,¹¹³ gives the supposed reason for the rule in regard to parol evidence. He says that: "It is assumed that, in choosing the solemn form implied to express and embody their personal intention and agreement, parties have intended to thereby fully express that intent and agreement; removing them in this manner from the number of debatable questions, and beyond bad faith, or the treacherous tenure of 'slippery memory.' To admit parol evidence would, in the intendment of law, utterly defeat this object. The instrument, therefore, is conclusive as to the point which it covers."¹¹⁴

In the case of *Union Mut. Life Ins. Co. v. Mowry*,¹¹⁵ the supreme court of the United States insisted upon the application of this rule. The policy contained a condition that, unless the premium was paid when due, the policy should be void. The defendant in error sought to excuse default in payment by showing that the agent who took the application on which the policy was issued agreed that the company would notify the insured of the time when the payment of the premium should be made, and that no such notice had been given. It was urged that the failure to give the agreed notice estopped the company from insisting upon the forfeiture. To this proposition the court did not assent. It said: "To this principle there is an obvious and complete answer. All previous and verbal agreements were merged in the written agreement. The understanding of the parties as to the amount of the insurance,

¹¹² 17 Ins. Law J. 50, 37 Minn. 300, 34 N. W. 35.

¹¹³ Page 229.

¹¹⁴ *Freeman v. Bass*, 34 Ga. 358; *Couch v. Woodruff*, 63 Ala. 466; *Weeks v. Medler*, 20 Kan. 57.

¹¹⁵ 96 U. S. 544.

the condition upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases; but, until thus corrected, the contract must be taken as expressing the understanding of the assured and of the insurance company."

A policy is only the written evidence of a contract that already exists, and when the policy has not been written, or when properly executed is withheld, the contract for insurance, if complete, may be shown by parol. The one thing indispensable is that the minds of the parties have met in respect to all the essentials of the contract; that the *aggregatio mentium* exists.¹¹⁶

§ 25. Courts Cannot Make Contracts for the Parties.

It is the duty of courts to interpret contracts, not to create them. Where the written instrument is obscure, or contains ambiguous words, it is the province of the court to ascertain the intention of the parties from the attending circumstances, and this may be shown, for such purpose only, by extrinsic evidence; but when there are no obscurities, and no fraud or mistake is alleged, the court is forbidden to go beyond the "four corners of the contract."¹¹⁷

¹¹⁶ *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

¹¹⁷ *Dover Glass-Works Co. v. American Fire Ins. Co.* (Del. Err. & App.) 29 Atl. 1039; *Martin v. Insurance Co.* (N. J. Sup.) 31 Atl. 213; *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. 82, 83; *Maril v. Insurance Co.*, 95 Ga. 604, 23 S. E. 463; *Fireman's Fund Ins. Co. v. Barker* (Colo. App.) 41 Pac. 513.

The policy, as written, delivered, and accepted, is conclusively presumed, in an action at law, to express the entire contract of the parties. *Phenix Ins. Co. v. Wilcox & Gibbs Guano Co.*, 13 C. C. A. 88, 65 Fed., at page 730; *Bennett v. Insurance Co.*, 27 Atl. 641, 55 N. J. Law, 377; *Virginia Fire & Marine Ins. Co. v. Morgan*, 18 S. E. 191, 90 Va. 290; *Union Cent. Life Ins. Co. v. Chowning*,

§ 26. When Insurer is Estopped from Declaring Forfeitures.

When the company has knowledge of facts, at the time the insurance is effected, which, if undisclosed by the assured, would void the policy, it will afterwards be estopped from setting up such facts as a defense to a suit under it. Where the insurer, for instance, has incorporated into its policy a condition that "if the property insured be incumbered the fact must be represented to the company, and its consent expressed in writing on the policy, or it will be void," if it appears that the company had knowledge of an incumbrance when issuing its policy and receiving the premium, and omitted to indorse its consent on the policy, the principle of equitable estoppel may be successfully invoked to save a forfeiture. The fact of knowledge may be shown by parol testimony.

In applying the principle of estoppel, the courts have frequently found much difficulty, and their decisions have not always been in accord. There is often an apparent inconsistency between the rule that a "written contract cannot be changed by parol evidence," and the application of the doctrine of estoppel. The discussion frequently leads to subtle distinctions, and the conclusions reached are sometimes justified more because of their relations to justice than to legal rules. In the case supposed, either one of two things may be presumed: First, that the company waived the condition requiring consent of the incumbrance to be indorsed on the policy; or, second, that to issue a policy, and accept the premium, under circumstances where the company knew and intended that no indemnity would be afforded, is a fraud on the insured. No rule of law can, of course,

26 S. W. 982, 86 Tex. 654; *Walton v. Insurance Co.*, 116 N. Y. 326, 22 N. E. 443; *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77.

There was attached to the policy a clause requiring the insured to keep books of account, which should be preserved in a manner specified, and produced in the event of a loss. There was a failure to perform, and testimony was offered to show that the agent who negotiated the insurance and wrote the policy at that time told the insured that the keeping of books would be unnecessary. It was held that "testimony of oral contemporaneous declarations which contradict the provisions of the policy" must be disregarded. *Germania Ins. Co. v. Bromwell* (Ark.) 34 S. W. 83.

be invoked to aid those who are seeking to find their advantage in the perpetration of fraud. In cases of this kind, parol evidence is admissible to show that a written contract was procured, or its terms fixed, through fraud or misrepresentation. In support of this proposition the authorities are very numerous.¹¹⁸ It has been held

¹¹⁸ *Cushing v. Rice*, 46 Me. 303; *Selden v. Myers*, 20 How. 506; *Lull v. Cass*, 43 N. H. 62; *Montgomery v. Pickering*, 116 Mass. 227; *Meyer v. Huneke*, 55 N. Y. 412; *Gage v. Lewis*, 68 Ill. 604; *Hines v. Driver*, 72 Ind. 125; *Turner v. Turner*, 44 Mo. 535; *Fuller v. Lamar*, 53 Iowa, 477, 5 N. W. 606; *Wade v. Saunders*, 70 N. C. 270.

In *Mershon v. Insurance Co.*, 34 Iowa, 87, the court said: "If the insurer received the premium, with full knowledge of facts constituting a breach of one of the conditions of the policy, the right to insist that the policy is forfeited for that cause is gone."

See *Plumb v. Insurance Co.*, 18 N. Y. 392; *Potter v. Insurance Co.*, 5 Hill (N. Y.) 147; *Insurance Co. of North America v. McDowell*, 50 Ill. 120; *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64; *Roberts v. Insurance Co.*, 41 Wis. 321; *Aetna Live-Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246; *Hough v. Insurance Co.*, 29 Conn. 10; *Andes Ins. Co. v. Shipman*, 77 Ill. 189; *Franklin v. Insurance Co.*, 42 Mo. 456; *Miner v. Insurance Co.*, 27 Wis. 693; *Bryant v. Insurance Co.*, 21 Barb. (N. Y.) 154; *Cobb v. Insurance Co.*, 11 Kan. 93.

The evidence tended to show that the plaintiff explained to defendant's agent, at the time of negotiating the insurance, that it was his purpose to place a mortgage on the property to be insured. Held, that the defendant company was estopped from pleading the incumbrance as a defense. *Hardwick v. Insurance Co.*, 23 Or. 290, 31 Pac. 656.

Application was prepared by defendant's agent, and untruthfully stated the incumbrance. Agent was an attorney, and, while acting in professional relations for the insured, was made acquainted with the facts in regard to the incumbrance. The court held that the knowledge and fraud of its agent estopped the insurer from denying liability under the conditions of the policy. *Beebe v. Insurance Co.*, 53 N. W. 818, 93 Mich. 514.

When the insurer has knowledge of incumbrances at the time the policy is written, it will be estopped from setting up such incumbrances as a defense in a suit to recover for loss. *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13, 26 S. W. 763; *McNally v. Insurance Co.*, 137 N. Y. 389, 35 N. E. 475; *Steele v. Insurance Co.*, 93 Mich. 81, 53 N. W. 514; *Hartford Fire Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. 685.

Facts known to the agent at the time insurance is effected will be knowledge imputed to the company. If insurer accepts risk with knowledge of facts that constitute a forfeiture under the conditions of the policy, it will, after a loss, be estopped from pleading such facts as a defense. Forward

by the court of appeals of Indiana¹¹⁹ that, unless the existence of incumbrances was particularly inquired about, the policy conditions, requiring disclosure by the insured, will be deemed to have been waived.¹²⁰ This decision does not appear to have in its support the weight of authority, and, besides, is subject to the criticism of being illogical, and repugnant to the language of the policy.¹²¹

v. Insurance Co., 142 N. Y. 382, 37 N. E. 615; *Haire v. Insurance Co.*, 93 Mich. 481, 53 N. W. 623.

¹¹⁹ *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534.

¹²⁰ The policy stipulated that it should be void if the property insured was then, or should thereafter become, incumbered, without consent of the company indorsed thereon. It was in evidence that the property was mortgaged when the insurance was effected, and that the fact was not disclosed. Held that, as there was no inquiry in regard to incumbrances, the company must be deemed to have waived the condition. *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534. The authorities referred to in support of this decision are *Short v. Insurance Co.*, 90 N. Y. 16; *O'Brien v. Insurance Co.*, 52 Mich. 131, 17 N. W. 726; *Hall v. Insurance Co.*, 53 N. W. 727, 93 Mich. 184; *Wright v. Insurance Co.*, 31 Pac. 87, 12 Mont. 474.

¹²¹ In *Beck v. Insurance Co.*, 44 Md. 95, the court said: "In this view of the case, it was wholly immaterial whether the existence of the incumbrance was material to the risk or not, or whether the fact that none was disclosed induced the insurer to issue the policy or not. The parties themselves, by their contract, have made it material, and have stipulated that if incumbrances were not disclosed the policy should be void."

See full and able discussion of the duty of insured to disclose title, incumbrances, etc., when required by the conditions of the policy, in *Waller v. Assurance Co.*, 10 Fed. 232. We quote from the language of Judge McCrary: "But it is insisted that compliance with this provision of the policy was waived by defendant company because its agent made no inquiry concerning the extent of plaintiff's interests, and plaintiff made no statement on the subject. The evidence does not support this position. The contract was that if the interest of the insured was any other than entire, unconditional, and sole ownership, then he was to represent the facts to the company, not that he was to disclose them truthfully if requested."

In *Wilcox v. Insurance Co.*, 55 N. W. 188, 85 Wis. 193, it was alleged in the complaint that, at the time the defendant inspected the subject of insurance (a horse), no questions had been asked as to the title, or as to other insurance, and that plaintiff did not know that such facts were in any way material to the risk, or that the defendant intended that the policy to be

§ 27. Usage will not Control or Nullify Definite Contract Stipulations.

Custom is an unwritten law, established by implied consent. More accurately speaking, it is the habit of long-continued acting in a uniform manner concerning particular things. Mr. Broom, in

issued thereon should contain a provision relative to such matters. The policy issued was the statutory form in Wisconsin, and the conditions in regard to title and incumbrance, it is admitted, were the same as in all other policies in use in that state at that time. The plaintiff had received his policy some two or three weeks before the loss occurred. Judge Cassoday, of the supreme court of Wisconsin, in his opinion said: "Upon such receipt of the policy the contract of insurance was complete in all its terms, and binding upon both parties. The plaintiff accepted it with all its conditions and limitations. In the absence of any fraud or mistake, he was, on general principles and authority, conclusively presumed to know its contents. *Fuller v. Insurance Co.*, 36 Wis. 599; *Herbst v. Lowe*, 65 Wis. 321, 26 N. W. 751; *Bonneville v. Assurance Co.*, 68 Wis. 298, 32 N. W. 34; *Hankins v. Insurance Co.*, 70 Wis. 5, 35 N. W. 34; *Quinlan v. Insurance Co.*, 31 N. E. 31, 133 N. Y. 365. In this last case it was, in effect, held that the fact that the insured was ignorant of the conditions printed in the policy of insurance of the standard form prescribed by the statute of that state did not prevent the forfeiture by reason of his failure to comply with such conditions, since the conditions were part of the contract, and, hence, that he was bound to take notice of them. The clause of the policy quoted declares, in effect, that the entire policy shall be void in case the assured had, or should procure, any other insurance on the property covered by the policy, or incumber the same by chattel mortgage, 'unless otherwise provided, by agreement indorsed thereon or added thereto.' There is no pretense of any such agreement indorsed thereon or otherwise, and such prior insurance and chattel mortgage are admitted in the complaint. Such being the facts, it follows from the authorities cited that the policy was void in its inception, unless the condition was waived by the company." *Bennett v. Insurance Co.*, 55 N. J. Law, 377, 27 Atl. 641.

In *Thomson v. Insurance Co.*, 90 Ga. 78, 15 S. E. 652, the insured had previously held a policy in defendant company, which permitted the property covered to remain vacant for thirty days without prejudice. The policy in suit was a continuance of that risk, and limited the term of vacancy to ten days. This change in form was not known to the insured, although he had had the policy in his possession for four months when the fire occurred. It was held that insured had the means of knowledge in regard to the conditions of the contract, and that his neglect to inform himself did not change

his Legal Maxims, says: "When any practice was, in its origin, found to be convenient and beneficial, it was naturally repeated, continued from age to age, and grew into a law, either local or national. A custom, therefore, or customary law, may be defined to be a usage which has obtained the force of law, and is, in truth,

the rights of the parties. *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060.

In a late case in Michigan (*Wierengo v. Insurance Co.*, 98 Mich. 621, 57 N. W. 833) the court held that the insured was charged with knowledge of the conditions of the policy. The case is carefully considered, and the principles of law applicable are ably discussed by Justice Grant.

The Wisconsin court, in the case of *Edwards v. Insurance Co.*, 88 Wis. 450, 60 N. W. 782, held that when insured accepts policy, with knowledge of its terms, it will be held to embody the agreement of the parties.

When policy is in possession of the insured, knowledge of its contents will be presumed. *Syndicate Ins. Co. v. Bohn*, 12 C. C. A. 531, 65 Fed. 165.

The policy, at the time of the fire, and at all times before, had been in the hands of the agent of the insurer. The insured could, however, have had its possession at any time, had he so desired. The court said that the insured must be presumed to know the contents of the policy; that, if he had not read it, he alone must be in fault, and must be bound by its conditions, in the same manner and to the same extent as would have been the case had the policy been in his actual possession. *Guinn v. Insurance Co. (Tex. Civ. App.)* 31 S. W. 566.

The law presumes that the parties to a contract know its contents. *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. at page 80.

It was a condition of the policy that incumbrances should be disclosed. There was no written application, no questions were asked by the insurer concerning mortgages, and no representations made by the insured. At the time of negotiating the insurance and the writing of the policy, there were two chattel mortgages on the property covered, of which the insurer had no knowledge. Both of these mortgages were matters of public record; that is to say, they had been filed and recorded under the statutes of the state of Texas. It was urged by plaintiff—First, that, as a matter of law, he owed no duty to state any facts in regard to incumbrances unless his attention was directed to the matter by some inquiry made at the time; second, that the filing and registering of the mortgage with such officer as the statute designated was such notice of the incumbrance as to charge the insurer with knowledge. This supreme court of Texas, in discussing these two issues which the record presented, said:

"But a waiver does not arise where the insurer is ignorant of the condition of the property against which the warranty is intended to provide. 2 Wood, Ins. pp. 1151, 1152. Do the facts stated in the agreement made by the par-

the binding law within a particular district, or at a particular place, of the persons and things which it concerns."

When the contract is silent or obscure in regard to any particular matter, custom may be shown, to explain the intention of the parties. Where the performance of some act is provided for, but

ties show that the insurer did not intend to insist upon the warranty, embraced in the policy, against incumbrances existing, at the time, upon the property? In support of the ruling of the court of civil appeals, we are referred to a number of authorities, of which we regard the following as bearing most directly upon the question to be determined: *Wright v. Insurance Co.*, 12 Mont. 474, 31 Pac. 87; *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534; *Short v. Insurance Co.*, 90 N. Y. 16; *Continental Ins. Co. v. Munns*, 120 Ind. 30, 22 N. E. 78; *Philadelphia Tool Co. v. British-American Assur. Co.*, 132 Pa. St. 236, 19 Atl. 77. The cases of *German Mut. Ins. Co. v. Niewedde* and *Wright v. Insurance Co.*, above cited, fully sustain the ruling of the court of civil appeals. The question involved in the case of *Continental Ins. Co. v. Munns* was entirely different from that now before the court. In that case the owner of the property had insured it, and received the policy containing a condition against future incumbrances, after which he mortgaged the property, and then sold it, assigning his policy to his vendee, with the consent of the insurer. The property having been destroyed by fire, and suit filed against the insurance company by the assignee, the defendant set up the forfeiture occasioned by the mortgage placed upon the property before the assignment of the policy. The court held that the assignment of the policy with the consent of the insurance company constituted a new contract with the assignee, and that it was not affected by the previous forfeiture, accruing by reason of the mortgage made by the party originally insured. It is true that in that case the court uses language which indicates that it was the duty of the insurance company to make inquiry as to the condition of the property; but an examination of the case will show that the expression had reference to a different clause of the policy, and not to the warranty then being considered. In *Short v. Insurance Co.* the agent who issued the policy testified, as stated, in substance, by the court, that, 'for the purpose of making out the policy, when no written application is presented, he makes inquiries and memoranda of such matters as he deems important, and to suit himself, and that he did so in this case.' And the court said: 'Being in the same city, and knowing where the premises were situated, with ample opportunity to ascertain their condition, it is, perhaps, a legitimate inference that he did not deem it important or material, and made the insurance without regard to its occupation. At least, there was some evidence in this direction; and, such being the case, it was a question of fact, for the jury to determine, whether the defendant's agent knew the condition of the premises, or regarded it of any consequence whether the premises were oc-

the time, manner, or place of performance has not been definitely fixed, and it appears that these particular matters are the subject of a long-established and well-settled usage or custom, the parties will be presumed to have contracted in reference to such custom; but, when the contract clearly expresses the intention of the par-

cupied or otherwise, and made the insurance without any reference whatever to the subject of occupation. If he did so, then the condition as to future vacancy or nonoccupation was nugatory, and may be regarded as waived.' In the case of *Philadelphia Tool Co. v. British American Assur. Co.*, a policy had been issued upon certain tools, machinery, and buildings. The policy contained the condition that if the buildings were situated upon leased land the entire policy should be void. The plaintiff recovered for the insurance upon the personal property alone. The defendant insisted that the policy was void as a whole. The supreme court of Pennsylvania held that the policy was valid, and gave judgment upon the verdict for the value of the personal property insured, and, in course of the opinion, used language which would seem to indicate that in the opinion of the court the duty rested upon the company to inquire into the state of the title, and that it will be presumed that the policy was issued upon the knowledge of the agent of the insurer.

"Eliminating the record of the chattel mortgages from this case, the judgment cannot be sustained upon the evidence, except upon the ground that it was the duty of the agent of the insurer to inquire as to the existence of the chattel mortgages upon the property insured. The evidence shows, upon this question, that the defendant's agent, 'examined the property, and made no inquiry as to the existence of the mortgages.' The examination of a horse could furnish no notice of the existence of an incumbrance upon it, as would the examination of a house show the fact that it was vacant. Hence, such examination could not be notice of what it would not disclose. There being no acts done by the agent from which a waiver or estoppel could arise, we come to the question, was it the duty of the agent to inquire as to the incumbrance upon the property insured? That such duty does not devolve upon the insurer, when no printed or written application is presented, is supported by the best authorities, of which we cite the following: *McFarland v. Insurance Co.*, 46 Minn. 519, 49 N. W. 253; *Wilcox v. Insurance Co.*, 85 Wis. 193, 55 N. W. 188; *Sanders v. Cooper*, 115 N. Y. 279, 22 N. E. 212; *Beck v. Insurance Co.*, 44 Md. 95; *Ellis v. Insurance Co.*, 68 Iowa, 578, 27 N. W. 762. We think that the contention that it was the duty of the agent of the insurance company to inquire as to the existence of incumbrances is in conflict with the well-settled principle that in the absence of a written application a warranty of this character is binding upon the insured, whether he is aware of its existence or not; for, if it be held that it was the duty of the insurer to make inquiry as to the ex-

ties, its terms cannot be set aside, or in any way modified to conform with local custom, no matter how well established or general it may be. While custom may, and often does, have the force of law, in the absence of express stipulations, the contract will always control when its terms are in conflict with the customs of the business or the place.¹²²

istence of the mortgages, the same rule must apply to all other warranties relating to the condition of the property at the time that the policy is issued, and the result would be that the insurer would be held to waive the warranty when he did not know the existence of the thing to which the waiver applied. It would follow that if the insurer did not inquire as to the condition of the property the warranty would be waived, and if he did inquire, and was informed of the facts, it would also be waived; from which it would likewise follow that the insured could only be bound by a warranty contained in his policy in case he made false representations, or was guilty of concealment, upon inquiry made of him by the insurer. Thus, all warranties would be converted into representations, and the binding force of warranties, as such, destroyed. It is a legitimate subject of legislation, but not within the power of courts to so change the law. We conclude that, upon the facts of the case as presented here, it does not appear, as a matter of fact or law, that the insurer waived the clause, or that it did not intend to insist upon it when it was inserted in the policy, and that the law does not require that it should have made inquiry as to incumbrances. While it was not incumbent upon the agent of the insurance company to inquire as to the existence of incumbrances upon the property, yet, if the agent did enter upon such examination, and make such inquiry with reference to the property as justified the insured party to believe that he was informing himself of all matters material to the risk, and was relying upon such information, the insured might, under such circumstances, consider the warranty waived,—that is, that it was not intended to be insisted upon by the insurance company,—and under such circumstances the fact that he had not read his policy might be material, in connection with the other proof, in determining his rights thereunder; for the reason that, relying upon the acts of the agent, it would not be necessary for him to examine the policy to ascertain the terms upon which it was made." *Aetna Ins. Co. v. Holcomb* (Tex. Sup.) 34 S. W. 915.

¹²² Proofs of loss had not been served within the stipulated time, and it was sought to excuse performance by showing that other insurance companies doing business in the same locality did not require proofs until after the claim had been adjusted. It was the opinion of the court that the defendant could not be bound by such custom of other companies; that the filing of proofs within a certain stipulated time was a condition precedent, which must be performed before plaintiff would be entitled to recover. *Phenix Ins. Co. v. Munger*, 49 Kan. 178, 30 Pac. 120.

In *Higgins v. Moore*,¹²³ the court said: "It is obvious that the rights of the plaintiff cannot be controlled or affected by a local usage in a particular trade. The usage is invalid, and has no binding force upon the plaintiff. Such usage, if sanctioned, would be to overthrow the law in the city of New York. If it prevails there, it cannot be allowed to control the settled and acknowledged law of the state. Again, the pretended usage is void as not general (being confined to certain persons in New York), unreasonable, and against public policy. The proposition that persons engaged in a particular trade at a particular place can, by a custom adopted and regulated by themselves, create a power beyond what is actually conferred or necessarily implied, depriving an owner of his property, the possession of which he had not parted with, seems to me so fraught with mischief, as well as unsoundness, as to require only its announcement to meet repudiation."

It will not often occur that the nebulosities of the fire insurance contract can be resolved by reference to usage. There are, no doubt, many customs, both local and general, that affect in an important sense the interests of that business; but it is found that they relate chiefly to executive affairs, and seldom immediately concern the policy holder. Usage must be uniform and notorious.¹²⁴ The course of dealing between one company, its agents and patrons, will not affect or bind other companies, their agents and patrons, who may prefer wholly different methods in conducting their business. In matters, too, of personal trust, which often involve considerations of financial responsibility, uniform habits of credits are

¹²³ 34 N. Y. 425.

¹²⁴ To bind the parties, a usage must be so general, uniform, and notorious that it may be presumed to have been known to them. *Phenix Ins. Co. of Brooklyn v. Wilcox & Gibbs Guano Co.*, 13 C. C. A. 88, 65 Fed., at page 729.

The policy provided that it should become void unless the note given for the premium should be paid at maturity, and it was held error to admit testimony showing a custom of insurer to permit indulgence, and to not insist upon strict compliance. Custom cannot be shown, to change a distinct contract stipulation. *Union Cent. Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 455, 28 S. W. 117; *Wheeler v. Newbould*, 16 N. Y. 392; *Furniss v. Hone*, 8 Wend. 247; *Dykers v. Allen*, 7 Hill (N. Y.) 497; *Merchants' Bank of City of New York v. Woodruff*, 6 Hill (N. Y.) 174; *Donnell v. Insurance Co.*, 2 Sumn. 377, Fed. Cas. No. 3,987; *Clark v. Baker*, 11 Metc. (Mass.) 189; *Bradley v. Wheeler*, 44 N. Y. 503.

frequently impracticable. Indulgences which would be prudent at one period might be exceedingly perilous at another. A usage, therefore, to be reasonable, must contemplate the special exigencies to which the business is subject.

In the execution of the insurance contract, regard must generally be had to the special and technical use of words in particular trades and professions, when the language of such trades and professions differs from the ordinary speech. When words and phrases come to have a distinct and well-understood meaning in particular localities, or in connection with special subjects of commerce and manufacturing, it will be presumed that the parties to the contract have so far recognized and adopted local and trade customs as to have used language, in expressing their agreements, in the idiomatic, local, and technical sense.¹²⁵

¹²⁵ In defining the relations of usage to the contract, Judge Story said in *The Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657: "The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied."

It is said in 27 Am. & Eng. Enc. Law, 752: "In numerous actions upon policies of insurance, the usages of particular insurers, or the local insurance usages of particular places, have been set up in defense of the demands of the insured. In perhaps all the cases the usages have been disallowed, unless the insured was known to have knowledge of them. The insured is entitled to have the policy interpreted in accordance with the general principles of law, unless his contract was made in reference to particular usage."

Where there was no express contract between the parties, it was held competent to show the customary method of computing or measuring certain work. The court said: "It is, however, to be remarked that evidence of the nature referred to will not have the effect of changing or affecting an express contract of parties in regard to the subject-matter to which it is directed." *Graham v. Trimmer*, 6 Kan. 230.

In *Stout v. McLachlin*, 38 Kan. 120, 15 Pac. 902, the contract was in writing, and an effort was made to prove a custom on the part of one of the parties to the contract which differed from, and in fact was repugnant to, the terms of the contract as written. This the court held it was incompetent to do. We

§ 28. Reformation of Contract.

When the contract, as written, does not in fact express the intention of the parties, the one seeking an enforcement on the terms of the actual agreement should ask a court of equity for a reformation. If suit is brought on the contract as written, recovery cannot be had on another that exists partly in parol, and is something essentially different. In states where the same court exercises the functions of both law and equity, a reformation may be asked for and had at the same trial where recovery is sought under the contract in an action at law; but if the plaintiff elects to sue on the contract as written, and fails to recover, he cannot afterwards avail himself of the relief which a reformation would afford. The claim to have reformation must appear in the complaint. If asked for in the reply it will not avail.¹²⁶ When the complaint asks for a recovery on the policy as it is written,

quote: "The proof of usage can only be received to show the intention or understanding of the parties in the absence of specific agreement, or to explain the terms of a written contract."

Justice Miller, in *Partridge v. Insurance Co.*, 15 Wall. 573, declares that proof of a custom cannot be made "to add to, vary, or contradict the well-expressed intention of the parties made in writing."

So the general rule of the common law is that words are to be considered and understood according to their usual and ordinary import, in their common acceptance among men in the community. So, where the words employed in a conversation between two persons are plain, ordinary words, without any ambiguity about them, they must, as a general rule, speak for themselves, and the jury is left to consider and apply them according to their ordinary signification.

The law recognizes an exception to this rule, as where certain terms and phrases acquire a technical or a particular meaning among certain trades, professions, or special classes of business men, and are so employed in such technical sense by and among such classes of men, then such technical or special import and meaning may be imputed to them. *Potter v. Insurance Co.*, 63 Fed. 382; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Fowler v. Insurance Co.*, 7 Wend. (N. Y.) 270; *Wall v. Insurance Co.*, 14 Barb. (N. Y.) 383; *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416; *Whitmarsh v. Insurance Co.*, 16 Gray (Mass.) 359; *Harper v. Insurance Co.*, 1 Bosw. (N. Y.) 520; *Winthrop v. Insurance Co.*, 2 Wash. C. C. 7, Fed. Cas. No. 17,901; *Arn. Ins.* (3d Ed.) 1068.

¹²⁶ *Cox v. Insurance Co.*, 29 Ind. 586; *Mason v. Mason*, 102 Ind. 38, 26 N. E. 124.

averring a performance of all the conditions precedent, it would be a departure for the reply to ask a recovery on a contract different from the one referred to in the complaint, and on which judgment is demanded.

§ 29. When Reformation of Contract will be Refused.

Courts will not order a reformation unless the proof is conclusive that the written instrument does not express the agreement actually made between the parties. If the writing correctly represents the understanding of one of the parties, and not of the other, then it will clearly appear that their minds have never met, and no contract has been consummated.

In *Mead v. Westchester Fire Ins. Co.*¹²⁷ the contention was as to which one of two buildings the policy in suit was intended to insure. The evidence received on the trial of the case clearly indicated that the insured and the agent of the company, while agreeing as to the terms of the insurance, each had in mind a different building as the property which the policy issued was intended to protect. The court held that the facts did not justify a reformation; that they could not make a contract for the defendant which it had failed to make for itself. We quote from the opinion of Rapallo, J. He said: "The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the court in changing the language of the instrument sought to be reformed, except in cases of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. Losing sight of the cardinal principle in the administration of this peculiar remedy would lead to an assumption of a power which no court possesses,—of making an agreement between parties to which they have not both assented."¹²⁸

¹²⁷ 64 N. Y. 454.

¹²⁸ The property was owned by both father and son, but insured to the son alone. This was the result of a misunderstanding as to who owned the property, the company's agent supposing the ownership to be in the son, although the insured and his father intended to state it differently; that

In *Hearne v. New England Mut. Marine Ins. Co.*¹²⁹ the action was on a policy covering a risk on the bark *Maria Henry*, chartered to go from Liverpool to Cuba and load for Europe, via Falmouth, for orders where to discharge. The defense was that the vessel had deviated from the voyage described in the policy. The evidence sustained the contention of the defense, and the court held the company discharged from liability. Subsequently the plaintiff filed his bill in equity to have the contract reformed. This was refused. Swayne, J., in delivering the opinion of the court, said: "The correspondence between the parties constituted a preliminary agreement. The answer to Hearne's proposal was plain and explicit. It admitted but one construction. He was bound carefully to read it, and it is presumed he did so. In that event there was as little room for misapprehension on his part as on the part of the company. * * * The inference of full and correct knowledge is inevitable. It is as satisfactory to

is, that the whole estate would vest in the son on the father's death. Reformation refused. *Cushman v. Insurance Co.*, 65 Vt. 569, 27 Atl. 426.

When the policy expresses what the parties intended it should express, there is nothing to reform. If the parties afterwards learn that they have contracted unwisely, and that something different would best promote their interests, the courts will not, and cannot, lend their aid. Courts do not make contracts, nor change those already made, however much the parties interested may so desire. *Moeller v. Insurance Co.*, 52 Minn. 336, 54 N. W. 189.

The wife of plaintiff testified that, when effecting insurance, she truly stated the facts in regard to title. This was denied by the agent. Held, that the uncorroborated testimony of the wife was insufficient to justify reformation. *Schroedel v. Insurance Co.*, 27 Atl. 1077, 158 Pa. St. 459; *Moore v. Giesecke*, 76 Tex. 543, 13 S. W. 290.

The plaintiff must show, in order to have reformation, that there had been a different contract entered into than that which was expressed by the writing, and, further, that the policy failed to express the intention of the parties, through some fraud, accident, or mistake. *German Ins. Co. v. Daniels* (Tex. Civ. App.) 33 S. W. 549. See, also, *Hughes v. Insurance Co.*, 55 N. Y. 265; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 161; *Ledyard v. Insurance Co.*, 24 Wis. 496; *Goddard v. Insurance Co.*, 108 Mass. 56.

Must ask for reformation within a reasonable time after obtaining knowledge of the fraud or mistake. *Thomas v. Bartow*, 48 N. Y. 193; *Dodge v. Insurance Co.*, 12 Gray (Mass.) 71; *Grymes v. Sanders*, 93 U. S. 55.

¹²⁹ 10 Alb. Law J. 348.

the judicial mind as direct evidence to the same effect would be.
* * * The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended."

There is a class of cases where knowledge on the part of the company of facts that render the policy nugatory from its inception does not raise estoppel, and where it is at least very problematical whether a reformation can be had. Wood mentions a case that came before the New York courts, where the insured were commission merchants, —a fact well understood by the company, who issued to them a policy containing a stipulation as follows: "Goods held in trust or on commission are to be declared as such, otherwise the policy will not extend to cover such property." The policy was not indorsed so as to relieve the exception expressed as above. No reformation of the contract was asked for, but the plaintiffs contended that, as the character of their business was known to the company, it was its duty to so formulate the contract that not only their own property, but as well that which they held in trust or on commission, would be protected. But the New York court of appeals thought otherwise. Cochran, J., said: "The policy in this case is entirely consistent with the terms of the application, free from ambiguity, and susceptible of a consistent construction in all its parts; and, if there was a mistake or error in the insurance effected, it does not appear to be one attributable to appellant, nor such as to authorize us to look beyond the terms of the policy, in ascertaining its meaning and legal effect. We think it cannot be excepted from the operation of the general rule regarding written contracts,—to be interpreted by their own terms, without regard to extrinsic facts. * * * This policy expressly provides that it was not to cover goods held on commission, unless they were so described, or, as we understand it, so expressed as to appear in some form in the description of the goods intended to be covered by it. The right of the insurer to limit the extent of the risk by that condition cannot be doubted, and, as we must presume from the acceptance of the policy by the appellees that they had

knowledge of that condition, we think it should have the contemplated effect of limiting the risk to the goods which belonged to them."

But suppose that no part of the stock in this case had been the exclusive property of the assured; would the obligations of the insurance company in respect to its liability for the commission goods have been changed in any important sense? We think not. If the policy made and accepted was consistent with the application, there could exist no valid reason why it should be extended, after a loss, to cover other property, which by its terms was specially excluded, because the insurer had such knowledge as one person may have, and frequently does have, of another person's affairs, and, as in this case, that the stock covered was commission goods. It is the clear duty of a person seeking insurance to disclose his interest in the property which he intends to have protected, and when he fails to do so the principle of equitable estoppel will not prevent the company from insisting on its contract rights. We are frequently reminded that in law, as well as in theology, important things hang upon very slender threads, and the distinctions made in cases of this kind are sometimes so exceedingly fine as to almost baffle the perceptive powers of the judicial mind. While the mystic line cannot always be found that "separates thine from mine," and right from wrong, it is reasonably clear that there is a difference sufficiently marked to form the basis of legal action between that unreliable and nebulous sort of knowledge, such as an ordinarily observant person will incidentally obtain concerning the business affairs and property interests of others, and such accurate information in regard to specific facts as may be required by a prudent person entering into engagements that involve possibilities of an important character. What we usually know of one and another's relationship to chattel property is too vague and indefinite to be made the basis of indemnity contracts. A policy can be reformed only when it is shown that it does not express what both parties intended it should. If they have contracted in reference to mistaken ideas of either law or fact, relief cannot be found in reformation. Parties seeking the aid of a court of equity to correct their mistakes must prove something more than the limitations of their knowledge. It will not be sufficient for them to say, "Had we understood the facts or the law better, we should have contracted differ-

ently." The courts may pity their infirmities of knowledge, but have no power to make for them the contract they would have made for themselves had they been wiser.

In *Mackenzie v. Coulson*,¹³⁰ Sir W. M. Jones, V. C., said: "Courts of equity do not rectify contracts. They may and do rectify instruments purporting to have been made in pursuance of the terms of contracts, but it is always necessary for a plaintiff to show that there was an actual, concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately expressed in the instrument. * * * It is impossible for the court to rescind or alter a contract, with reference to the terms of negotiation which preceded it."¹³¹

In *Baldwin v. State Ins. Co.*,¹³² the owner of the property, E. T. Baldwin, being involved financially, and apprehending that in the event of a loss troublesome complications might result, on account of attachments or other proceedings at law to delay the collection of the insurance money, or divert it to other hands, caused the property to be insured in the name of his son, W. E. Baldwin, who had no interest whatever in the subject of insurance. The court, in holding that the policy could not be reformed so as to entitle the owner of the property, E. T. Baldwin, to recover, presents a very clear exposition of the principles of law applicable. It said: "If he contracted for the insurance, and the intention was to insert his name in the policy as the insured, and by mistake the name of W. E. Baldwin was inserted, the way would seem to be clear to reform the policy by the insertion of E. T. Baldwin's name as the insured, in the place of that of W. E. Baldwin, and to give E. T. Baldwin a right of recovery. But the evidence shows conclusively that W. E. Baldwin contracted for the insurance, and paid for it, and that his name was purposely inserted in the policy as the insured. There was never any understanding on the part of any one that E. T. Baldwin's name was to be inserted in the policy. The policy was drawn precisely as the parties to it intended it should be, and, so far as E. T. Baldwin had any-

¹³⁰ L. R. 8 Eq. 368.

¹³¹ *New York Ice Co. v. Northwestern Ins. Co.*, 31 Barb. (N. Y.) 72; *Guernsey v. Insurance Co.*, 17 Minn. 104 (Gil. 83); *Severance v. Insurance Co.*, 5 Biss. 156, Fed. Cas. No. 12,680.

¹³² 60 Iowa, 497, 15 N. W. 300, and 12 Ins. Law J. 371.

thing to say about it, precisely as he intended it should be. The facts were, as shown conclusively by the evidence, that E. T. Baldwin was financially embarrassed, and apprehended that, if the policy ran to him, his creditors, in case of loss, would, by garnishment or otherwise, reach the insurance, and subject it to the payment of their claims. It was to obviate this difficulty that his son, W. E. Baldwin, caused the property to be insured in his own name, and paid the premium himself. If now we reform the policy so as to make it payable to E. T. Baldwin, we shall do so, not only in the absence of any mistake, but we shall make a contract in behalf of E. T. Baldwin which both he and his co-plaintiff took pains to avoid. It is manifest that to do so would be a most extraordinary exercise of equitable power, and for which the law affords no warrant." Unless a party seeking to reform a contract on account of mistake proceeds to have the error corrected within a reasonable time after it is discovered, relief will be refused.

§ 30. When Suit is Brought on Contract, it is an Election of a Remedy.

When, either by fraud or mistake, the written instrument does not express accurately, in any essential particular, the contract as agreed to, the party whose rights are prejudiced by the fraud or mistake may invoke a court of equity to have the writing corrected. But, if he elects to proceed at law to enforce the contract as written, he cannot afterwards ask for reformation. When a party has a choice of two remedies, and makes his election, he is bound thereby. This election may determine when the party, with knowledge of his rights, enters upon any decisive course of action, as the commencement of suit. The principle governing in a case of this kind is essentially that of waiver. The party injured, knowing of the error in the written instrument, if he intends to insist on his right to have it corrected, may not adopt such course of action as will lead the other party to reasonably suppose that it is abandoned. After having brought suit, and compelled the other party to answer, with cost and trouble, under the contract as written, he will not be permitted to depart from this course, and enter upon another and inconsistent one, such as a change in the terms of the contract would contemplate. We do

not think that this is stating the principle too broadly, although we do not find any adjudicated case fully sustaining the views stated.

In *Sanger v. Wood*,¹³³ suit was brought in a court at law, and judgment obtained. Then a bill was filed to rescind the contract because of fraudulent acts claimed. These acts were known before the trial and judgment, and it was held that, by proceeding to trial after knowledge of the facts on which the right to rescind was based, the party filing the bill had made a conclusive election of remedy, and waived any right to rescind the contract in equity. Chancellor Kent said: "The suit at law and the action here are inconsistent with each other, since one affirms, and the other seeks to disaffirm, the contract in question. Any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of conflicting and inconsistent remedies."

So, too, in the case of *Washburn v. Great Western Ins. Co.*,¹³⁴ the action in a court of law had been prosecuted to judgment, when a bill was filed in equity to reform the policy. On dismissing the bill, the court said: "We are of the opinion that the plaintiff, by bringing an action at law upon the policy in its original form, and prosecuting that action to trial, verdict, and judgment upon the issue, whether he had complied with the warranty contained therein, conclusively elected to consider it as expressing the true contract between himself and the insurance company, and to abandon any attempt to have it reformed in equity."

While, in each of the cases here referred to, the action had proceeded to judgment before a bill was filed to reform, the relief asked for was not refused on the grounds of *res adjudicata*, but for the reason, distinctly stated, that the party elected to adopt another and inconsistent remedy. The dismissal of the bill in both instances was based upon the act of election, and not upon the fact of a verdict and judgment. The bringing of a suit was a voluntary act. It proclaimed choice, will, election. That which followed the verdict and judgment, while partly a sequence, was largely depending upon other and independent considerations, and was not controlled by the arbitrary will of the plaintiff in the suit. The only decisive act of election, therefore, was the bringing of the action. From this con-

¹³³ 3 Johns. Ch. 416.

¹³⁴ 114 Mass. 175, 4 Ins. Law J. 112.

clusion there can be no escape, and it may be fairly assumed that in the cases here considered the bills would have been dismissed, and a reformation of the contract refused, even though there had been no verdict and judgment.

We think the rule of law to be correctly stated in *Thwing v. Great Western Ins. Co.*¹³⁵ It was there held that if the insured has been guilty of laches or delay in seeking a correction of the error; that is, if, after knowledge of the mistake, he takes no step to secure its correction, he is treated as having waived the error, and cannot invoke the aid of the courts of equity to reform it.¹³⁶

§ 31. Construction.

In the construction of policies there are often mortifying surprises, because the fittest word was not chosen to express the intention of the parties. The exact man is the one who will less frequently be called to suffer humiliation and defeat at such time. Haste is never a valid excuse for being wrong in the use of written words, on the interpretation of which will depend important legal rights. Who and what is insured are matters that are often so indefinitely expressed as to puzzle the best wisdom of the courts. It is a common thing to insure "the heirs of Blank," and, when loss occurs, legal proceedings frequently become necessary to determine what persons may claim under the policy, and from whom the company can receive a valid acquittance. Thus, expense, controversy, and delay result, which could easily be avoided by carefully designating by name the persons insured. It will sometimes happen that the question as to who inherits the property is uncertain, and may be awaiting judicial inquiry. In such cases a representative of the unknown may always be appointed, and the insurer secured the benefits of knowing with whom it has to deal, and from whom it may have a final discharge.

In making contracts there can be no good excuse for using elastic words, such as may be contracted either into a negation of the promise made, or extended to include possibilities not considered and

¹³⁵ 111 Mass. 93.

¹³⁶ *Paddock v. Insurance Co.*, 104 Mass. 521; *Ryder v. Insurance Co.*, 101 Mass. 548; *Conant v. Perkins*, 107 Mass. 79.

not embraced in the agreement of the parties. There is always danger, too, in the use of general terms, which are frequently pregnant with surprises that overwhelm with disaster when the greatest apparent security exists. The New York court of appeals, in deciding the case of *Weed v. Hamburg-Bremen Fire Ins. Co.*,¹³⁷ emphasizes the importance of defining with great precision the parties insured. The policy in that case was issued to the "estate of O. Richards," and expressed the usual stipulation that it should be void unless the exact interest of the insured in the property was represented to the company. The loss was made payable to the plaintiff, Weed, who was a mortgagee, and had paid the premium. Before the insurance was effected, Richards had conveyed the entire property, by trust deed, to one Sage. This fact was unknown to the agent who wrote the policy, and the defendant company claimed it was relieved from the payment of the loss. After the making of the trust deed mentioned, and before the policy in suit was written, Richards died. Earl, C. J., who wrote the opinion of the court, said: "What is the precise significance of the word 'estate,' when used as it is here, has not been determined in any case, and the law has not assigned to it any definite meaning. It is an indeterminate word, the precise meaning of which is to be ascertained from the circumstances under which it is used. It may be used to represent the interest of administrators in personal estate, or the interest of widow and heirs in real estate, or the interest of all these in both personal and real estate; and the scope to be given to it will depend largely upon the persons who procure the policy, and the purpose for which it was procured. Here the plaintiff knew of the trust deed. He needed an insurance covering all the interests in the property. He could have had no purpose to insure any particular or limited interests. It was difficult, if not impossible, to specify what particular interest the administrator or the heirs or the trustee had, and hence the comprehensive word 'estate' was used to cover all the interests. The plaintiff procured this insurance through an insurance broker, and it does not appear that he had any negotiation in reference thereto with the defendant or its agent. He must, therefore, be presumed to have

137 133 N. Y. 394, 31 N. E. 231.

chosen the phrase inserted in the policy; and the defendant assented to it, and must be held to have assented to its use in the most comprehensive sense that will give validity to the policy."

It will be seen that the court here holds that, by insuring the "estate of O. Richards," the interests of the heirs, trustees, and mortgagees are all protected, and that the policy was not avoided on account of the admitted failure to disclose the particular interests of the several parties concerned.

§ 32. Statutory Policies.

Certain of the states have formulated a policy of fire insurance, and, under severe penalties, forbidden the use of any other. The provisions of this policy are made mandatory, and must be regarded as having the force of law. An examination of these forms, and the law compelling their use, discloses that there are two distinct classes of conditions. One includes all of the provisions expressed in the printed form. This class cannot be changed. Nothing can be added thereto, or taken therefrom, except as the statute specifically provides. The other class comprises certain special agreements, that relate chiefly to the description of the property covered, the interests insured, and defines such extension or limitations of the risk as are permitted by the statute.

The first of these classes, it will be observed, is qualified by the other in a few particulars, but in each case only in the manner and to the extent designated by the statute. The first class of conditions referred to, it seems very clear, cannot be changed by agreement, waiver, or otherwise. The second class may be modified, or even annulled, as it consists wholly of stipulations and agreements which the parties are permitted to make for themselves. This conclusion is the logical result of the statutory character of the policy. If not correct, then all of the conditions belonging to the first class can be waived, and in that event the policy may become a wholly different thing from what the law requires. By waiver the purpose of the legislature may be rendered abortive. This possibility of thwarting the legislative will was foreseen and adequately provided for. In the last paragraph of nearly all statutory policies, we find the following prohibitive and explanatory clause:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as, by the terms of its policy, may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto."

While admitting that this explanatory clause is somewhat involved, it clearly enough signifies that the printed conditions of the policy cannot be waived by any officer, agent, or representative of the company; that such agreements and stipulations as the statute permits the parties themselves to add to the policy may be waived by written indorsement, and in no other manner. The courts for a very long time have held that parties could not bind themselves irrevocably by contract; that, however they agree to-day, they may agree to something very different to-morrow. Public policy is opposed to contracts of a kind that cannot be changed by mutual agreement, should new circumstances arise, or the arbitrary will of the parties require it, and there is no power in the courts to enforce such contracts. But the policies we are considering are not agreements between the insured and the insurer. They are not even contracts, in the true meaning of the word. The legislature has prescribed the conditions of the obligations, and the assent of the parties interested is compelled. Such of the conditions of these policies as have been definitely prescribed by legislative enactment, if not in contravention of the constitution, have the force of law, and cannot be abrogated by the agreement of the parties interested, or rendered nugatory by waiver. It will be conceded that a person may waive a right secured by law, when the benefit of such right does not extend beyond his individual advantage; but this statutory policy, if justified at all, must be on the ground of public policy, and when this requires the enforcement of a condition the person for whose benefit it was made has no privilege to waive. "*Privatorum conventio juri publico non derogat.*"

The word "contract" has often been defined by the courts, and always to mean "an agreement of parties, upon a sufficient consideration, to do or not to do a particular thing"; "to draw together"; "for minds to meet"; "a compact"; "an interchange by agreement of legal rights"; "a deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from doing, some act."

In making a contract, there must always be freedom to choose, judge, and decide. The right of dissent is as essential as that of consent. In respect to one class of conditions in the statutory policy, there is granted to the parties bound no privilege of choice. The obligations imposed, while mutual, may be unequal. They are created by legislative fiat, and often bind unwillingly both the insurer and insured. The statutory policy was conceived and enacted as a measure of public policy. It is general in its character and application, and its usefulness depends upon its integrity being preserved. This cannot be done if its provisions can be changed or abrogated by agreement or waiver of the parties.

In carefully estimating the full significance of the legislative intent and power which has given effect to the statutory policy, it will be unwise to overlook the very important fact that the use of any different form is prohibited, and that any company which disregards this prohibition may be fined, and in some states deprived of the privilege to continue business. If, therefore, it be admitted that an insurance company, by the deliberate act of its president or secretary, can bind itself by stipulations or conditions inconsistent with those prescribed by the legislature, no presumptions can exist that an agent or adjuster, when acting within the scope of his apparent authority, can, by special agreement or by waiver, so change the policy conditions as to affect the relation of parties. In the absence of any express authority to do the particular act, the principal will not be bound, as it will not be presumed that authority has been given an agent to do that which the law forbids.

In *Quinlan v. Providence-Washington Ins. Co.*¹³⁸ the action was to recover under the standard policy of New York. That policy, in its printed conditions, provides that the company shall be excused from payment of loss if, "with knowledge of the insured, foreclosure

¹³⁸ 133 N. Y. 356, 31 N. E. 31.

proceedings be commenced." After the policy was issued the property became mortgaged, and, before the fire, foreclosure proceedings were commenced. The defendant company did have notice of the incumbrance, and indorsed the policy, "Loss, if any, payable to the mortgagee." Of the suit to foreclose, the company had no knowledge. It does appear, however, that the fact was known to its agent, and plaintiff sought to avoid the forfeiture by plea of waiver. The court said, "The conditions violated in this case were contained in the authorized blank, and as to these the agent had no power in any manner, in writing or otherwise, to waive them."

In *Bourgeois v. Northwestern Nat. Ins. Co.*¹³⁹ the action was brought to recover \$2,000 under the terms of the Wisconsin standard policy. One of its conditions is: "This entire policy, unless otherwise provided by agreement, indorsed thereon or added thereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

At the time this insurance was effected the agent of the defendant company was informed that the insured would soon thereafter procure, in another company, additional insurance, and by parol he gave his assent thereto. The only question before the court was as to the competency of the agent, at the inception of the insurance, to waive in this manner one of the printed conditions of the policy. Justice Winslow, who wrote the opinion, said: "In 1891 an act was passed by our legislature providing for the uniform policy of insurance to be issued in this state, known as the 'Standard Insurance Policy.'¹⁴⁰ This act went into effect September 1, 1891. The policy in suit here was the standard policy provided for by that act, was issued December 16, 1891, and consequently must be governed by the provisions of that act."

The act referred to provides that: "After September 1, 1891, no insurance company shall issue any form of policy on property in Wisconsin, except such as conforms in all particulars to the standard policy, and no other conditions or agreements shall be endorsed thereon or made a part thereof, except the name of the company, loca-

¹³⁹ 57 N. W. 347, 86 Wis. 606.

¹⁴⁰ Laws Wis. 1891, c. 195.

tion, the amount of stock and sundry other matters not necessary to be here stated. Printed or written forms of descriptions, and specifications or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts or conditions shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy herein provided for) may be written upon or attached or appended to any policy on property in this state."

The learned judge then explains that it was the purpose of the law to secure a uniform policy,—one that would be fair to both parties, easily understood, and free from clauses cunningly devised to entrap the ignorant and unwary. He then says:

"It provides in clear and distinct terms that other conditions may be printed or written upon or attached to the policy, but that they shall not be inconsistent with, nor a waiver of, any of the provisions or conditions of the standard policy. In thus providing that other conditions may be incorporated in the policy by writing or printing, other methods are plainly excluded, under familiar legal principles. The intent, plainly, was and is that, so far as the conditions and provisions of the standard policy go, they shall govern, and that they shall not be omitted, changed, or waived in any manner. Other provisions, not conflicting, we think, may be added in writing, or printed, but the conditions of the standard policy itself must remain unimpaired.

"The condition here broken was one of the conditions of the standard policy. It is claimed that it was waived, not in printing or writing, but by mere word of mouth. Can this be successfully maintained? If so, then this part of the law is at once emasculated. If this be so, then the agent may do, by the merest casual word of mouth, that which neither he nor the company could do by the most formal written stipulation under seal. Such a result cannot be tolerated. The law could be scarcely more explicit in its terms than it is. To our minds, it is clear that since the enactment of this law, at least, the local agent cannot, either in writing or by parol, at the time the insurance is effected, change or waive that provision of the standard policy prohibiting future additional insurance. We are not

to be understood as deciding anything further in this case. This is the sole point involved in the decision, and consequently the sole point decided." ¹⁴¹

It is, no doubt, true that the insured has frequently been successful in evading forfeitures the parties had stipulated should occur on a failure of the warranties contained in the application. His unsupported evidence on the trial of the issue has, in many instances, been sufficient to overcome the testimony of the agent, and the very strong presumptions that always exist to sustain the verity of a written instrument. The application,—which is made a warranty, and the basis of the insurance,—we may suppose, contains a statement that the property is "unincumbered," but after the loss it is ascertained that there was a mortgage which antedated the policy. Here is a dilemma for the claimant: As the record stands, the facts warranted are not true, and the insurer is discharged. The claimant sometimes finds relief, under such circumstances, by discrediting the application, which in most cases is written by the hand of the company's agent. The insured may contend that he gave truthful answers to all questions asked, and that the statement contained in the application, that there was no "incumbrance,"

¹⁴¹ It was said by the New York court of appeals that the use of the standard policy was compelled by legislative enactment, to remedy existing evils, and to protect insurance companies from the perils of alleged parol waivers by their local agents. Every person who now enters into a contract of insurance is required to agree that no officer or agent or other representative of the company shall have power to waive any provisions or conditions of the policy, except such as by the terms thereof may be the subject of agreement indorsed thereon. *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191.

Conditions of standard policy cannot be waived, except as therein provided. *Anderson v. Assurance Co.*, 59 Minn. 182, 60 N. W. 1095, and 63 N. W. 241.

An agent cannot change any of the provisions of the standard policy, except by written indorsement, and then only in reference to such matters as the law permits. *Parker v. Insurance Co.*, 39 N. E. 179, 162 Mass. 479.

In this case the court intimated a peril which might overtake the agent who, acting without authority, endeavored by waiver or otherwise, to either extend or limit the contract rights of one or the other of the parties; suggesting an application of the familiar rule that an agent, when he fails by his acts to bind his principal, will bind himself.

was without his knowledge, and a fraud upon the part of the insurer's agent. The jury may find the facts as sworn to by the plaintiff. The doctrine of estoppel in pais will be applied, and the warranty defeated. As the application is sent to the company which issues the policy, and no copy left in possession of the applicant, it cannot be denied that the circumstances of ignorance and inattention on the part of the applicant, and frequently of cunning on the part of the agent, favor mistakes and fraud. But when a copy of the application is attached to the policy, which is retained by the insured, the facts and opportunities are so changed that every valid reason is withdrawn for applying the principle of equitable estoppel. If the insured fails to read the application left in his own hands, there is no sound principle of business, or safe rule of law, that will excuse his neglect. When a party to a contract has the written instrument in his possession, the law will presume that he has knowledge of its contents;¹⁴² and, when its strict enforcement is asked for, there are no apparent reasons why the insured should be permitted to plead that the contract, as made, was something different from that which the writing expresses. Unless the courts are to abandon, in cases where corporations are interested, long-established rules of law, they should apply, in a case of this kind, the one that forbids the evidence of a contract to exist partly in writing and partly in parol. It is the undoubted duty of the courts, when possible, to secure justice, and to protect the weak and foolish from the greed of those who have power and cunning; but this should be done without an abandonment of legal principles. It may be better that the wrong should sometimes triumph over the right, and that "truth should be crushed to earth," than that the courts should, for temporary expedients, depart from rules of construction and practice, the wisdom of which has been approved by centuries of experience. The growth of the law has been coeval with that of civilization. Their history and traditions have been the same. For many ages the courts have been engaged in settling disputes proceeding from the greed and passions of litigants, and out of innumerable contentions the law has been evolved as it ex-

¹⁴² Thomson v. Insurance Co., 90 Ga. 78, 15 S. E. 652; Wilcox v. Insurance Co., 85 Wis. 193, 55 N. W. 188; Wierengo v. Insurance Co., 98 Mich. 621, 57 N. W. '833; Syndicate Ins. Co. v. Bohn, 12 C. C. A. 531, 65 Fed. 165.

ists to-day, to preserve civil order, and to make life, liberty, and property more secure. There can be no necessity so urgent as to justify even the temporary breaking down of that which expresses so much learning and experience. A breach that is made for the passage of one who is seeking refuge from wrong will afford ingress to scores whose only object is plunder. It would be difficult to point out the hardship of requiring a policy holder to abide by the terms of the contract he receives and retains, and who neglects to ask promptly for its rescission or reformation. It ought to be no excuse that he has not taken the trouble to read it, or to have some one read it for him. If too ignorant or simple-minded to understand its provisions, should the insurer be put at the disadvantage of having important protective stipulations abrogated by the courts? If the insured does not understand the language in which the contract is written, he may easily find those who do, and who will gladly interpret and explain. In any event, there is no duty resting on the insurer to make a different contract for the careful and wise than for the negligent and foolish. To each it may offer the same policy, to all alike is the same measure of promise, and all alike are bound by the same limiting and restrictive clauses. The only case known to the author where this exact question has been considered by the courts is that of *Johnson v. Dakota Fire & Marine Ins. Co.*¹⁴³ The application there was attached to the policy, and contained an untrue statement in regard to incumbrances. The plaintiff showed on the trial, by undisputed evidence, that the incumbrances had been correctly stated to the agent, who, in filling up the application, had, either fraudulently or by mistake, written "No incumbrance," when the facts were otherwise known to him. The application was not referred to in the policy, but by its own, independent agreements, the statements it contained were made warranties. The policy, with the application attached, was in the hands of the insured for several months before the loss, and no objection was made by him to the manner in which it had been filled up by the company's solicitor. It was in evidence, and not disputed, that the plaintiff had never read his policy, and did not know what the application contained when the loss occurred. The su-

¹⁴³ 1 N. D. 167, 45 N. W. 799.

preme court of North Dakota said: "It is well settled that, where an insurance policy is delivered to the applicant, he is presumed to know its contents, and cannot evade a forfeiture, for a violation of its provisions, on the ground that he never read it. * * * When a paper is physically annexed to the policy, or indorsed thereon, and adopted in the policy as a part thereof, the same will form a part of the contract." Then, proceeding, it quotes from the language of Justice Field as follows: "There is another view of this case equally fatal to recovery. Assuming that the answers of the assured were falsified as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agent, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and its statements."¹⁴⁴ The conclusion reached by the Dakota court was, substantially, that the plaintiff, on receiving a copy of the application, was charged with knowledge, and that after a loss he was estopped from denying that he knew what the policy and application contained. That knowledge being presumed, it was the duty of plaintiff to speak his dissent; and, failing to do so, he became constructively a participant in the fraud practiced by the agent. Justice Wallin, who writes the opinion, discusses the legal propositions involved with great vigor and clearness. His conclusions are logical and just, and it may be hoped that, by affixing copies of applications to policies, the courts will be relieved from the consideration of one of the most complicated questions that insurance litigation presents.

Whether or not it is required by the statute, the custom should become universal, of attaching copy of application to the policy. Each paper forms a part of one contract, of which both parties should have the full text. When this is done, every reason will disappear for permitting the insured to show by parol evidence, in a suit to recover on the policy, that the statements expressed in the

¹⁴⁴ New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837.

application were not those made by the agent. Good faith and fair dealing demand that the insured, as well as the insurer, should have a full copy of the contract containing important covenants, upon the performance of which by one party the obligation of the other wholly depends.

§ 33. Conclusions.

A contract of insurance may be created by parol. When complete, the evidence of a contract cannot exist partly in parol and partly in writing. All previous and contemporaneous agreements, in the absence of fraud and mistake, will be presumed to have been merged in the written instrument. After a contract has been completed, it may be changed by the parol agreement of the parties. Parties cannot by agreement to-day bind themselves that they shall not agree differently to-morrow.

A principal, however, may limit the powers of his agent in such a manner that he cannot enter into contracts in his behalf, or change those existing, except by writing or by such other reasonable methods as he may designate.

A contract of insurance will not be complete unless there has been a meeting of the minds of the parties in respect to the following particulars: The sum to be insured; the time when the insurance is to begin and terminate; the subject to be insured; and the consideration. When, for any reason, the policy has become void, the obligation is ended. Subsequently the insurer has no duty to perform, unless there is a new agreement, supported by a valid consideration.

A contract of insurance must be in *præsenti*, and an agreement to insure at some future time will ordinarily have no greater legal effect than to make the agent personally liable to the person with whom he agrees for any damage that may be sustained by reason of the agent's failure to perform.

The contract of insurance is always personal, and when there has been a change of ownership of the property insured the insurer cannot be charged with the loss should it burn. The person insured has sustained no loss. The person who did sustain a loss had no insurance.

A contract of insurance is not complete when an action will not lie to collect the premium. If there is no duty resting on the insured

to pay the premium, there will be no duty resting on the insurer to pay a loss.

In law, obligation to perform will not be recognized unless there is consideration, and the insurer will not be bound unless the premium is paid, or payment has been waived. On the renewal of a risk, if no premium is agreed upon, the former rate will be presumed.

A contract is void when opposed to public policy, and the courts will not enforce the terms of a policy written to protect property embarked in an unlawful business. Where the proposal for insurance designates a particular time when the risk is to commence, and a subsequent acceptance is agreed to, without knowledge of a loss which occurred after the time specified when the insurance should begin, the insurer will be held. While the minds of the parties had not met before the destruction of the property, when the meeting was had it related to a time when the subject of the insurance was in existence.

If the policy does not provide any manner in which it can be terminated, a rescission can be had only by the agreement of the parties. In such cases there must be a meeting of the minds of the insured and the insurer in regard to the terms of the cancellation. The same condition of material agreement would be required in the unmaking of a contract as in the making of it.

When the policy designates the manner in which cancellation can be made, the party seeking rescission should follow literally the mode prescribed. If ten days' notice is provided, nine days will not be sufficient. If the insured requires the cancellation, he must go to the other party with his demands. If it is the insurer that asks to be relieved from its undertaking, it must seek the policy holder, and tender the unearned premium.

The insurance contract is generally held to be entire when the premium is not easily separable, as where the whole sum insured is promised for a single consideration. When this occurs a forfeiture as to one part voids all. In several of the states a different rule prevails, and the contract is held to be divisible in respect to distinct subjects or classes of property; as, where the policy covers in specific sums on both buildings and chattels, a forfeiture as to one subject will not discharge the insurer as to the other.

Courts may interpret or construe contracts, but they cannot make them. Neither have they the power to change those which the par-

ties have made for themselves. The duty of the court is to give legal effect to what the parties have agreed to, and it may not concern itself about the wisdom of such agreement, unless the terms of the contract which the court is asked to enforce are opposed to public policy. Possession of a contract creates a presumption that its contents are known, and, when the insured learns that his policy does not express correctly his agreement with the company, it is his duty to act promptly to secure the proper corrections.

A party will not be permitted to renounce a contract while enjoying its benefits.

When the policy is consistent with the application, the courts will neither extend nor restrict its terms.

When the policy refers to an application, a copy of which is attached, the two instruments become one contract, and, the policy being in the hands of the insured, he will be presumed to know its contents, and will not be permitted to deny that the statements contained in the application were made by him.

A policy will be construed in reference to the uses of the property insured, as the "occupancy of a dwelling house" would be construed to mean that some person was living in it, while the "occupancy of a farm barn" would not import that it was continuously in use, this class of buildings being generally empty during the spring and early summer.

A contract to sell property at some future time does not void a policy which provides against alienation, but a contract of sale is generally held to be a change of ownership.

As the company insures the person, and not the property, unless the policy otherwise provides, when the insured dies the obligation terminates.

The conditions and requirements of the policy are frequently made a part of the consideration. When this is the case, any failure to perform on the part of the insured will have the same legal effect as a failure to pay the premium.

When a loss has been caused by the wrongful act of another, the liability of the wrongdoer is primary, and that of the insurer secondary; and, if the latter pays the loss, it becomes subrogated against the former. When the liability of two parties to pay a loss is equal

(as when the obligation in both cases is created by contract), contribution may be required.

Contracts are made in reference to local ordinances and existing statutes, and will be construed and enforced as though the law was expressed in the contract itself. But statutes will be construed strictly, when abridging the natural right of persons to contract.

Reformation of a contract will be directed by a court of equity when the proof is conclusive that it has been incorrectly expressed through fraud of one of the parties, or when it is shown that the instrument does not express the intentions of either.

Usage is an unwritten law, evolved from the general and long-continued assent of persons engaged in special employments, trades, or professions, or subject to such special conditions and necessities as to modify the usual habits of business conduct, and to create exceptional rules of action. Usage may be shown to explain that which is obscure, but never to change or set aside a clear and distinct provision of the contract.

CHAPTER II.**AGENCY.**

- § 34. When the Acts of a Soliciting Agent will Bind His Principal.
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§ 34. When the Acts of a Soliciting Agent will Bind His Principal.

It is often difficult to determine with precision the duties, privileges, and powers of the agent. The great undertakings relating to

transportation, insurance, commerce, and manufacturing are mainly carried on through the instrumentality of agents; and, even with those who have given careful attention to the law of agency, it has not always been possible to ascertain, in particular and exceptional cases, to what extent the acts of the agent will bind a principal from whom he may have received either special or general authority. When an agent is appointed for the performance of certain specific duties, the principal will not be bound where the agent passes beyond the limit of his power, and assumes to act in respect to other matters.¹ An express authority, however, does not always mark the limitations within which an agent may act, and the principal be made responsible.² The powers of an agent may be implied when, unrestricted and unforbidden, he assumes to do things with the knowledge of the principal, although his express authority does not extend to the acts done. This general proposition is well understood, and the chief difficulty rests in applying it to particular cases. In the management of the insurance business, there are many agents employed, concerning whose acts controversies frequently arise.

The maxim, "*Qui facit per alium facit per se*," expresses a rule from which logically follows the conclusion that the agent, when authorized to act in respect to any particular matter, has full power to do all things necessary to be done, unless special restrictions are imposed; that is to say, his apparent authority, for the particular purpose of his agency, is co-extensive with that of the principal. While his real authority may be restricted to narrow limits, yet it will be obvious that a person dealing with him, having no notice of such limitations, will be justified in the inference that his powers are suffi-

¹ "It rests entirely with the principal to determine the extent of the authority which he will give to his agent; also, that every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority." *Ermentraut v. Insurance Co.* (Minn.) 65 N. W. 635; *De Grove v. Insurance Co.*, 61 N. Y. 594; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502.

² *Viele v. Insurance Co.*, 26 Iowa, 9; *Ruggles v. Insurance Co.*, 114 N. Y. 415, 21 N. E. 1000.

Agents representing foreign insurance companies may bind their principals by their acts, to the fullest extent. Parties dealing with them may rely on their authority to do all things referring to the matters of their appointment. *Franklin v. Insurance Co.*, 42 Mo. 456.

cient to enable him to carry forward to completion the undertaking in which he is engaged with the knowledge and approval of his principal.

It is important that we note carefully the distinction which is recognized by the law of agency between unrestricted power and unrestricted power concerning a particular matter. The agent's authority may be plenary in regard to the one or more things to which it relates, having beyond that no elasticity, or capability of extension.

When the powers of the agent are not particularly defined and limited, they will be presumed to be plenary in respect to the matters to which his appointment relates. The agent who has only authority to solicit risks and take applications, acting within the narrow range of his duties, without the power to make a completed contract, represents his company, to all intents and purposes, in regard to such things as he has been appointed to perform. The solicitor is, within the limit indicated, an authoritative, and often the only visible, representative of the company, whose office is frequently too remote to have any knowledge of the facts and circumstances which any particular case presents. The necessities of a business of this character demand a high degree of trust and confidence, and an implied delegation of powers to the soliciting agent that will enable him to perform fully and in good faith such acts as are required in offering a risk in an intelligent manner for the consideration of the company in whose service he is engaged. Facts, therefore, communicated to the solicitor by the applicant, will be knowledge imputed to the company, whether or not such facts are properly set forth in the application subsequently forwarded for the information of the company.

In *American Leading Cases*,³ the editor, after carefully reviewing the authorities, states his conclusion as follows: "By the interested or officious zeal of agents employed by the insurance companies, in the wish to outbid each other and procure customers, they not unfrequently mislead the insured by false or erroneous statements of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that when this course is pursued the

description of the risk should, though nominally proceeding from the assured, be regarded as the act of the insurer."

It must be admitted that this statement expresses with forcible candor that enlightened sense of justice which has found in most cases the approval of the courts.

The agent appointed to solicit insurance and take applications will bind his company, when acting within the scope of his authority, as firmly as could the president of the company acting in the same relation. His knowledge in respect to any material fact affecting the condition or character of the risk is imputed to the company employing him, and will create an estoppel as to defenses that would otherwise be available under the policy. But when the contract is completed, and the policy delivered, the soliciting agent has no further authority in regard to the matter. Whatever may be subsequently said or done by him will in no manner change the relation of the parties. He has no power to increase or lessen the existing obligation.

The apparent authority of the soliciting agent will extend to such matters as relate to the survey of the premises to be insured, the preparation of the application, and receiving notice of all material facts affecting the risk. Information communicated to him concerning title, incumbrance, other insurance, and all such other facts as may qualify the applicant's interest in the property, or in any way affect the character of the hazard, will be knowledge to the company.⁴ The blank applications and surveys which the so-

⁴ Under the statutes of Wisconsin, it has been held that, in certain cases, soliciting agents could bind their principals by parol agreements to insure. *Stehlick v. Insurance Co.*, 87 Wis. 322, 58 N. W. 379.

When a person applies for insurance through a soliciting agent, he must, at his peril, ascertain the scope of such agent's authority. *Sun Fire Office v. Wich* (Colo. App.) 39 Pac. 587.

Insured is chargeable with knowledge of the limitations of a soliciting agent's authority. He is bound to take notice that no general powers are conferred. *Dryer v. Insurance Co.* (Iowa) 62 N. W. 798.

A soliciting agent cannot bind his principal by consenting to other insurance, even though it be done in the manner which the policy designates. *Hartford Fire Ins. Co. v. Small*, 14 C. C. A. 33, 66 Fed. 490.

Notice to a soliciting agent, having only power to receive and forward applications, is notice to the company of any fact affecting the risk. *Boetcher*

licitor has in his possession do not imply an authority on his part to do more than to obtain full information concerning the risk, and to forward the application to the general office for its approval. There is nothing in the equipment of the solicitor to suggest larger powers,—nothing that imports an authority to make a binding contract of insurance; and, should the applicant deal with him with other expectations, he will do so at his peril. When the person seeking insurance on his property, at the request of a soliciting agent, signs an application addressed to the company or its general agent, it must be apparent to him that the solicitor with whom he is negotiating in regard to material preliminary requirements has no authority to complete a contract, and that any agreements between them relating to the specific terms of such contemplated insurance, other than those set out in the application, are nugatory. It cannot be well supposed that the applicant would be so deficient in his understanding of what was being done as to consider it necessary to make a formal written application to the secretary or general agent of the company, whose office was located in a distant

v. Insurance Co., 47 Iowa, 253; *Simmons v. Insurance Co.*, 8 W. Va. 474; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Sias v. Insurance Co.*, 8 Fed. 183, 10 Ins. Law J. 500; *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Manchester Fire Assur. Co. v. Glenn* (Ind. App.) 40 N. E. 926; *Goss v. Insurance Co.* (Wis.) 65 N. W. 1036.

The soliciting agent was appointed to take applications, and forward the same for approval. His authority referred only to the performance of these duties. It was held that under section 1977 of the Revised Statutes of Wisconsin, making a solicitor of an insurance company an agent "to all intents and purposes," the solicitor had authority only for the particular thing he was appointed to do; that for that purpose, and for that only, he was an agent "to all intents and purposes"; that his agency related to matters preliminary to, and leading up to, the completed contract; that when the negotiations terminated in the writing and delivery of the policy, the occupation and duties of the solicitor had ended; that he had no power to waive any of the policy conditions. *Bourgeois v. Insurance Co.*, 86 Wis. 402, 57 N. W. 38; *Hankins v. Insurance Co.*, 70 Wis. 4, 35 N. W. 34.

One Miller, an agent with full powers, had employed a solicitor, who was unknown to the company. It was held that facts communicated to such employé was notice to the company. *McGonigle v. Insurance Co.*, 168 Pa. St. 1, 31 Atl. 875; *Ermentraut v. Insurance Co.* (Minn.) 65 N. W. 635.

city, if the person with whom he was there dealing had authority to bind the company by his agreements in respect to a completed contract of insurance.

§ 35. The Powers of an Agent will be no Larger than Those Which the Principal has Conferred.

It is no more the province of the court to make agents, than it is to make contracts. They have no power whatever in either case. The nature and extent of power which the agent shall possess is a matter solely for the principal to decide. It may be much or little, and whether it is one or the other will be nobody's affair, providing no one is misled to his injury in dealing with such agent. If the principal permits and ratifies such course of dealing on the part of his agent as to give the appearance of a larger measure of power than that actually conferred, such permission and ratification will imply an authority which persons dealing with the agent may safely assume to exist. While the general rule is that a person dealing with an agent is put on inquiry as to the limit of his power to act, where agency is admitted authority will be presumed to do all things necessary, within the apparent scope of the employment. A soliciting agent will be presumed to be authorized to take applications, and to receive all necessary information to enable him to make an intelligent presentation of the risk to the company; but a person dealing with an agent of this class would not be justified, ordinarily, in supposing him to have the power to make a completed contract to insure, either by parol or in writing.

So, too, an agent having authority to make contracts of insurance, issue and deliver policies, and to do all things important to be done in that relation, will not be presumed to have any authority in respect to the adjustment of losses.⁵ In one employment there is nothing implied in regard to the other, for the very satisfactory reason that it is well understood that distinctly different persons are necessary to an intelligent and proper performance of these separate duties. The fact that accountants, and persons of accurate and extensive knowledge of the value of many different classes

⁵ *Turner v. Insurance Co.*, 109 Mass. 568.

of property, are indispensable in the computation of losses, and that it has been long customary to employ in this department of the insurance business persons of special fitness and exceptional skill, forbids any presumptions that agents employed in either of these capacities will have authority in respect to the other.

§ 36. Powers of the General Agent.

Another and more numerous class of agents is that upon which is conferred the authority to negotiate contracts of insurance, within limited territory; to collect the premiums, countersign and deliver policies; and to do all things necessary to be done on the part of the insurer to make the policy an effective contract of indemnity. The powers of this class of agents are usually plenary in respect to all ordinary hazards. They are usually intrusted with policies signed in blank by the officers of the company, in which they have been authorized to write the names of the parties to be insured, the sums covered, and a particular description of the property to which the insurance relates. The powers of this class of agents may be, and doubtless are, in most cases, particularly set out, and fixed in definite terms, by a written commission, or letter of instructions. When this is done, and the agent acts in excess of his authority, or fails to act when required, he will be liable to his principal for any injury he may have sustained by such misconduct.⁶ While a person dealing with an agent is put upon inquiry in reference to his authority to act, he is not bound, in the same manner that the agent is, by the restrictive instructions which the latter has received from his principal. He may judge of the agent's authority by what he is permitted by his principal to do. If it is known that the agent makes contracts of insurance, waives policy conditions, and does all things which the principal himself could do in the management of the business, and his acts are ratified, general powers may be safely inferred. The authority actually given the agent is generally private, but here is an apparent authority which will justify those dealing with the agent in supposing that his powers are plenary in respect to all mat-

⁶ *Franklin Ins. Co. v. Sears*, 21 Fed. 290; *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409, 31 N. W. 454.

ters preliminary to, and eventuating in, a completed contract of insurance. Agency will not be presumed. It must be shown. But it will be sufficient to establish that the alleged agent has acted in the relations named with the approbation of the principal; that he has been held out as having the powers claimed. The secret instructions of the principal, defining and limiting the authority of the agent, are important only in fixing the liability of the agent to the principal when disobedience or other misconduct occurs. Where, however, the limitations imposed upon the authority of the agent are brought to the knowledge of the insured, if he thereafter deals with him when acting in excess of such authority he will do so at his peril.

All insurance companies have prohibited risks, and all, too, impose prudential restrictions concerning lines. There are limitations to the liberty and power of the agent in the acceptance of the risk, concerning which he is fully instructed, but of which the public is not generally informed. Should the agent issue a policy on an interdicted risk, or accept a larger line than he had been permitted to write, and a fire should result before the policies were canceled, the insurer would be charged with the loss, as, in the absence of any definite information in regard to the powers of the agent, the public would be justified in presuming that, in the selection of risks and fixing of lines, he was acting within the scope of his authority.

If, however, the insured has notice of the restrictions imposed upon the agent, the company will not be held.⁷ The details of the insur-

⁷ "When a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by written indorsement on the policy, the condition is of the essence of the authority; and the consent or act of the agent, not so indorsed, is void." *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Baumgartel v. Insurance Co.*, 136 N. Y. 547, 32 N. E. 990.

When the policy restricts the agent to changing the contract in a particular manner (that is, by written indorsement), his oral agreements will be without legal effect. *Carey v. Insurance Co.*, 84 Wis. 80, 54 N. W. 18.

It was a provision of the policy that no one except certain persons, particularly named, should have authority to waive or modify any of its conditions. The action rested on an alleged waiver by the agent. The court said: "We think that the forfeiture of a contract or a condition which is essential to the continuance of the contract cannot be waived by an agent,

ance business are almost infinite, embracing subjects that refer to the interests of all kinds of property, and to the activities of a commerce which are the "beams and rafters" of our civilization, and the well-being of mankind. Much difficulty will inevitably occur in so directing the agencies employed that suitable provision will be

when the contract itself declares that he shall not have power to waive it, or that certain officers, who do not include him, shall have such power." *Porter v. Insurance Co.*, 160 Mass. 183, 35 N. E. 678; *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518; *Putnam Tool Co. v. Insurance Co.*, 145 Mass. 265, 13 N. E. 902; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196; *Marvin v. Insurance Co.*, 85 N. Y. 278; *Enos v. Insurance Co.*, 67 Cal. 621, 8 Pac. 379; *McIntyre v. Insurance Co.*, 52 Mich. 188, 17 N. W. 781; *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191.

The insurance was on the life of a horse. The company was notified that the horse was sick, and sent a surgeon, who later, in connection with the president of the insurance company, advised that the horse be killed. He was killed two hours before the expiration of the policy. Held that, in giving directions for the horse to be killed, the court could not presume that the surgeon and president were acting within the scope of their authority. *Tripp v. Insurance Co.*, 91 Iowa, 278, 59 N. W. 1.

It is competent for insurance companies to limit the power of their agents. *Hartford Fire Ins. Co. v. Small*, 14 C. C. A. 33, 66 Fed. 490; *Westchester Fire Ins. Co. v. Wagner* (Tex. Civ. App.) 30 S. W. 959; *Ermentraut v. Insurance Co.* (Minn.) 65 N. W. 635; *Egan v. Insurance Co.* (Or.) 42 Pac. 611; *O'Leary v. Insurance Co.* (Iowa) 66 N. W. 175; *Hankins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34; *Merserau v. Insurance Co.*, 66 N. Y. 274; *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660; *Bowlin v. Insurance Co.*, 36 Minn. 433, 31 N. W. 859; *Shuggart v. Insurance Co.*, 55 Cal. 408; *Leonard v. Insurance Co.*, 97 Ind. 299; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Universal Mut. Fire Ins. Co. v. Weiss*, 106 Pa. St. 20; *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137; *Northwestern Nat. Ins. Co. v. Mize* (Tex. Civ. App.) 34 S. W. 670; *Zimmerman v. Insurance Co.*, 77 Iowa, 685, 42 N. W. 462.

The following cases hold—sometimes in different form, and sometimes under policies having no limitation clause—that agents may waive and otherwise change the contract by parol.

Agents having power to make contracts of insurance, and to issue and deliver policies, may, by erasure or otherwise, and by written indorsement, annul or render nugatory any of the printed conditions of the policy, notwithstanding the clause providing that no agent can change any of the printed conditions, except in writing indorsed on the policy. *Parsons v. Insurance Co.* (Mo. Sup.) 21 S. W. 117.

Notwithstanding the limitation clause, an agent may waive conditions of

made for such cases arising as cannot be brought under the application of general rules.

The extension of the agency system has made it indispensable, for a prudent management of the business, that very definite relations be established between principal and agent, and that accurate methods be observed in all transactions in which there is mutual concern. The principal has found his safety and advantage in maintaining control in respect to all important matters, and for this purpose upon the authority of the agent have been placed closer restrictions; notice of such fact to the insured being given by incorporating into the policy a clause which distinctly declares that no agent shall have the power to waive or otherwise abrogate any policy condition, except by writing indorsed thereon.

policy by parol. *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. 71.

An agent having authority to make contracts and issue policies will bind his company by anything he may say or do in reference to such contracts. *German Fire Ins. Co. v. Stewart* (Ind. App.) 42 N. E. 286.

Note. It does not appear from the records in this case that there was any clause in the policy limiting the power of the agent.

It was held that the agent, who had power to make contracts, issue policies, etc., could bind the insurer by parol consent. There was no clause in this policy limiting the power of the agent to give consent in writing indorsed on the policy. *Phoenix Ins. Co. v. Witt* (Tex. Civ. App.) 25 S. W. 796.

In *Brown v. Insurance Co.* (Mass.) 43 N. E. 512, the court said: "There was sufficient evidence in this case to warrant the jury in finding that Porter, if not the general agent of the company, was held out by the company as having authority to make such a contract as is alleged to have been made in this case, and, as the evidence shows, was made. If Porter's authority was limited by private instructions given to him by the officers of the company, this cannot bind the plaintiff, if he had no knowledge of it. His authority 'must be determined by the nature of his business, and the apparent scope of his employment therein. It cannot be narrowed by private or undisclosed instructions, unless there is something in the nature of the business, or the circumstances of the case, to indicate that the agent is acting under special instructions, or limited powers.' *Markey v. Insurance Co.*, 103 Mass. 78, 92. Exceptions overruled."

Agent may waive proofs of loss by parol, notwithstanding the provision of the policy that waiver can only be made in writing indorsed thereon. *Burlington Ins. Co. v. Rivers* (Tex. Civ. App.) 28 S. W. 453.

Held that, while the agent could not waive conditions of policy when author-

This stipulation does not, in most cases, prohibit changes being made, but provides a particular manner in which the obligations of the contract shall continue to be expressed; that is, in writing. It cannot be regarded as an unreasonable discretion on the part of the insurer to insist that the character and scope of its written contracts shall not be changed by the often obscure and hastily considered parol agreements of agents, who have been, in most cases, appointed for the performance of duties requiring less judgment and skill. It should be kept in mind that the agent is called to act in these matters in the presence of an unforeseen exigency, while the requirement that consent to changes shall be by written indorsement contemplates precision, and that thereby such deliberation will be secured as all important business is entitled to receive.

ity was limited, he might accept partial performance under such conditions as to estop company from setting up nonperformance as a defense. *Phoenix Ins. Co. v. Rad Bila Hora C. S. P. S.*, 41 Neb. 21, 59 N. W. 752; *Kahn v. Insurance Co. (Wyo.)* 34 Pac. 1059.

Where the policy provides, in distinct language, as occurs in most cases, that no agent shall have power to change or modify its terms, or to waive any of its conditions, except by distinct and specific agreement indorsed in writing thereon, the assured will be presumed to have notice, after the policy has been delivered to him, that the agent has no authority to make any change in the terms and conditions of the insurance, except in the manner provided, and any attempt on the part of the agent to waive by oral agreement any of the policy conditions will be a nullity. The courts have held in numerous cases that it is competent for insurance companies to limit the authority of their agents in this manner. It is for the interest of both parties, and for the interest of the general public, that contracts of this class, involving as they do many complex subjects of agreement, should be set forth in precise terms, and reduced to writing. The memory is always "slippery," and should never be relied upon in important transactions, and especially where months and years may intervene between the promise and its fulfillment. The requirement that agreements changing the form and substance of the contract shall be in writing is intended to promote peaceable and friendly relations between contracting parties, and to lessen litigation by substituting the written word for indistinct and obscure verbal understandings. The insurance company is frequently dealing through agencies with a large number of persons, located at remote places. The necessities of a business so extended demand that the obligations entered into shall be clearly stated and put in such form of permanence that the verity of the promises made cannot subsequently be questioned, and made the subject of contention or legal inquiry.

The competency of the insurer to thus limit the powers of its agents has been exhaustively discussed by the courts, and different conclusions reached. The weight of authority, however, is clearly in support of the right of limitation, and the doctrine, in most states, is now well settled, that the insurance company may impose such restrictions on the authority of its agents; and when notice that it has been done is incorporated into the policy, and the policy is in the hands of the insured, claims for any benefits on account of anything the agent may have done, or attempted to do, when acting in excess of such authority, will not be enforced.

It will not be disputed that the insurance agent, within the scope of the business he transacts, is *pro hac vice* the insurance company. What he knows, they know. What he does, they do. While this is admitted, it is also true that the agent, as well as the principal, must observe, in making contracts, a reasonable regard for the common understanding of what should be said and done to create a mutual obligation. Verity imports distinctness of statement. Vague understandings, which result in nothing more than impressions, are not sufficient to create contract rights, or impose a duty of performance.

§ 37. Legal Effect of Agent's Opinion.

The opinion of an agent as to the legal effect of the language of a contract does not create new obligations, nor change those already existing.⁸

⁸ The policy provided that "no insurance shall be considered binding until actual payment of the premium"; and there was another provision that "no officer, agent, or representative of the company shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be indorsed thereon." And there was still a third clause, as follows: "This policy is made and accepted upon the above express terms, and no part of this contract can be waived, except in writing signed by the secretary of the company."

The premium was not paid, and it was pleaded, to excuse the default, that the agent who negotiated the insurance had, by agreement to a short credit, waived the condition requiring immediate payment. The court said that the policy "contained a plain declaration that no representative of the company but the secretary could waive the policy conditions, and hence no local agent could do it. This, being in the policy itself, was notice to plain-

This proposition is well illustrated in the case of *Laclede Fire-Brick Manuf'g Co. v. Hartford Steam-Boiler Inspection & Ins. Co.*⁹ At the time the insurance was effected, there were seven boilers in place. Afterwards, two more were added. Green, the president of the brick company, requested Eickhoff, the agent and inspector of the insurer, to inspect the boilers purchased after the writing of the insurance. This was done, and Eickhoff said then, and repeated the declaration on different occasions, that the added boilers were covered by the original insurance. The evidence of Green was: "I asked him if he considered those boilers insured, and he says, 'I do.' I says, 'Will you attend to the business for me?' * * * He says: 'I will. It is all right. Go ahead.' He told me the boilers were insured." Nothing more was done, and afterwards a loss occurred by the explosion of one of the new boilers. Judge Sanborn, in his opinion, said: "So radical a change in this contract ought not to be inferred, so burdensome a liability ought not to be imposed on this defendant, unless there is substantial evidence that at least the minds of Eickhoff and Green met upon, and agreed to, it. * * * Eickhoff gave it as his opinion, after the policy issued, as before, that it covered the additional boilers the plaintiff acquired, and that he considered them insured by that policy. Green accepted that construction. In their view, it would have been a futile act to modify or change the policy, because they thought it was itself sufficient to accomplish their purpose. It is true that the written contract may be modified by a subsequent oral agreement, and that a contract of insurance may be made by *parol*. But it is nevertheless true that the contract here in question was one of considerable magnitude,—one involving \$30,000; that the customary method of modifying policies of insurance and of making contracts of insurance for long terms is by written agreements, and that in most cases where oral con-

tiff that the agent at Faribault had no authority to waive the condition; that no insurance would be binding until payment of the premium. It is no answer to say that he did not read the policy, and hence did not know what it contained. He was bound to know this, and by accepting the policy he is estopped from setting up powers in the agent in opposition to the express limitations contained in it." *Wilkins v. Insurance Co.*, 45 N. W. 1, 43 Minn. 177; *Smith v. Insurance Co.*, 15 Atl. 353, 60 Vt. 682.

⁹ 9 C. C. A. 1, 60 Fed. 351.

tracts of insurance are made, they are initial, temporary contracts, to continue only until they can be embodied in a policy; and that the method pursued by the defendant when this policy was issued was to issue a written policy upon a written application. The fact that this talk was twenty-six days before the explosion; that no steps had been taken by either party meanwhile to put any contract of modification or of insurance in writing, and no demand had been made by the plaintiff for any such evidence of its contract,—strongly indicates that no such contract was ever made.”

In *Head v. Providence Ins. Co.*,¹⁰ Chief Justice Marshall, in delivering the opinion of the supreme court, said: “A contract varying a policy is as much an instrument as the policy itself, and therefore can only be executed in the manner prescribed by law. The force of the policy might, indeed, have been terminated by actually canceling it; but a contract to cancel it is as solemn an act as a contract to make it, and, to become the act of the company, must be executed according to the forms in which by law they are enabled to act.”

It is a principle of law, as fundamental as it is reasonable, that when an agent acts beyond the limits of his authority, and the fact is known to the person with whom he deals, the principal will not be bound. It is only upon a rigid observance of this just and conservative rule that the interests of the principal can be protected, and collusion and fraud on the part of the agent prevented.¹¹

¹⁰ 2 Cranch, 127, 168.

¹¹ In the case of *Northwestern National Ins. Co. v. Mize* (Tex. Civ. App.) 34 S. W. 670, there was attached to the policy a clause requiring the insured to keep a set of books containing a complete record of his business, and that these books should be deposited in an iron safe during the night, and at all times when the store was not open for business. No safe was kept, and one at least of the books was burned. The insured, to excuse his failure in producing the books containing a complete record of his business, offered to show that the defendant's agent had told him at the time the insurance was negotiated and the policy delivered that it was unnecessary to keep an iron safe. The court held that this declaration of the agent's opinion did not relieve the plaintiff from performance of his warranty; that, when accepting and acting upon this statement of agent's opinion, he had been informed of the conditions of the policy. He not only knew that he was required to keep an iron safe in which to deposit his books during the night, and at such times as his store was not open for business, but he also knew, from the provisions of the policy, that the agent had no authority,

§ 38. Misconduct of Agent Makes Him Personally Liable to his Principal for the Injury Occasioned.

An agent's fidelity to his principal must never be subordinated to his personal interests. When the principal is sacrificed by the agent, to promote his own advantage, it is such a misconduct as will make the agent liable to the principal for any loss occasioned. In the case of *Michoud v. Girod*,¹² the supreme court of the United States (Justice Swayne) said: "If agents discharge their duties and trusts faithfully, the law interposes its shield for their protection and defense. If they depart from the line of their duty, and waste or take for themselves, instead of protecting, the property and interests confided to them, the law, on the application of those wronged or despoiled, promptly steps in to apply the corrective, and restore to the injured what has been lost by the unfaithfulness of the agent." And Story on Agency¹³ states the same rule of law. He says: "Whenever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority, or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on the principal, he is responsible therefor, and bound to make a full indemnity."

Where an agent engaged in the business of insurance has in his office several companies, but, for some reason, decides to surrender the agency of some particular one, and thereupon, without consulting the company he proposes to immolate, proceeds to secure a wholesale cancellation of its risks, rewriting the business in other companies whose agency he intends to retain, such action is so far violative of his obligations as an agent as to create a liability to the principal for any damage he may have suffered; and if, as it frequently happens, the agent, in making cancellations, pays from his own funds unearned premiums to the insured, he cannot subsequently demand of his principal to be reimbursed on account of these advances. The law for-

except in writing indorsed on the policy, to waive a performance in respect to keeping an iron safe, and producing books.

¹² 4 How. 554.

¹³ Section 217.

bids, when disbursements are incurred by an agent in willfully despoiling his principal's interests, that the latter shall be charged.

In the case of *United States Fire & Marine Ins. Co. v. Tardy*,¹⁴ the company had become insolvent; and the agent, wishing to forestall the action of the receiver, by having the policies of the insolvent company issued by him canceled, and rewritten in other companies, of which he had the agency, without asking for instructions, proceeded at once to take up and cancel all policies, returning to the insured the unearned premium on the basis of allowing pro rata for the unexpired time. The court said: "No express authority was given to the agent to cancel policies, and no general power to act for the interests of the company can be construed into an authority to cancel them against the wishes of the principal. He does not profess that his purpose was to subserve the interests of the corporation. It does not appear that he did it any injury. The insured were not bound by any act under any special agreement, nor on any general principle of law. The policies cannot, therefore, be regarded as canceled by him."

It will frequently occur that after the agency is terminated the agent will continue to owe a duty to his former principal, which the courts will recognize, and enforce performance. That which the agent has done, for which he has received compensation from his principal, he may not undo, without his consent, after their relations are severed. Thus, an agent having procured risks to be written, on which he had been paid a commission, it was held bad faith on his part, after the agency had ceased, to cause such risks to be canceled and rewritten in other companies, to his own benefit, and to the loss of his former principal. For such a breach of faith the injured party will have his action for damages.¹⁵

The agent sells to his principal his services and skill, for a valuable consideration; and when afterwards he so acts that all benefits for this service and skill are transferred to himself, or to another whom he appoints, the principal is defrauded in substantially the same way that he would be if one who had sold him a horse afterwards, by stealth or by force, had taken it away. In the trades and profes-

¹⁴ 2 Ins. Law J. 673.

¹⁵ *Merchants' Ins. Co. v. Prince*, 52 N. W. 131, 50 Minn. 53; *American Steam-Boiler Ins. Co. v. Anderson* (Super. N. Y.) 6 N. Y. Supp. 507.

sions there are frequent instances where one has an established business or practice. By a long course of honorable dealings, or skillful use of expert knowledge, reputation of great value is acquired, and the occupation of a particular building or locality is a matter of so much advantage as to become the subject of bargain and sale. Property of this kind is sufficiently tangible to be recognized by the courts, and contracts made for its protection will be enforced. In some respects, the case of a tradesman or physician selling his good will is quite like that of an insurance agent selling to his company his energy, skill, and personal influence in securing risks. In neither case will the law sanction the withholding or taking back by one party of that which there has been a promise, expressed or implied, to deliver for the benefit of the other.¹⁶

¹⁶ The limitations of an agent's obligation will frequently be determined by his compensation. One will be co-extensive with the other. Where there is no consideration, generally there will be no duty to perform. The exceptions to this rule will in most cases arise out of the relations of confidence existing between principal and agent. One who acts for another, and having a beneficial interest in the matter, may not, after his agency is terminated, proceed to undo his previous act, in such a manner as to deprive his former principal of the advantage that would naturally result had there been no interference. Thus, an agent who takes a risk for an insurance company, for which he has been paid a commission, may not, after his agency has been terminated, induce the insured to surrender his policy for cancellation. This proposition rests as well on business faith, as on an implied contract duly to perform all that he had been paid to do.

In *Scottish Union & National Ins. Co. v. Dangaix*, 103 Ala. 388, 15 South. 956, the action was to recover certain premiums which had been assigned to Dangaix, who had issued the policies as agent of the insurance company, and, after his agency had been discontinued, procured the insured to surrender their policies for cancellation; and he, becoming the assignee of a large number of claims for unearned premium, brought suit against the plaintiff in error. The court said: "The authorities to which we have referred maintain the principle to which we give sanction, that when the plaintiff procured these policies to be issued by the defendant company, and was paid by it to procure them, there was an implied obligation on him—supported by the consideration he had been paid by defendant, as binding as if it had been expressed, and which was continuous during the life of the policies, even after the termination of the agency—that he would not deprive defendant of the fruits of the services it had employed him to render. The policy holders, as we have said, had the unquestioned right to cancel their policies and demand repayment of their unearned premiums; and if they did so of their own accord at any time, whether

In *Edmonstone v. Hartshorn*¹⁷ the question considered was whether the agent, in the conduct of which he was charged, had observed good faith to his principal. Edmonstone had been employed in Cuba for the purpose of soliciting orders for engines to be manufactured by Hartshorn. Besides other business transacted by Edmonstone, he received an order for an engine from a Mr. Bequire, but when Edmonstone returned to New York after his agency had terminated, instead of turning over the order mentioned to Hartshorn, who was his employer at the time of negotiations for the order, it was given to another manufacturer of steam engines to be filled. The court held that the agent did wrong in withholding this order from his principal, notwithstanding his agency was at an end at the

before or after the termination of plaintiff's agency, the plaintiff was in no sense responsible for the act. But for him, when he quit the defendant's employment, and for purposes of his own gain, to turn about and induce those who had insured with defendant to cancel their policies, and insure with him in another company, or in other companies, thereby depriving defendant of the benefit of premiums on policies which he, as its agent, had procured for a certain per cent. of the premiums paid to and still retained by him, was a violation of duty he owed defendant, which finds no sanction in law."

In *Merchants' Ins. Co. v. Prince*, 52 N. W. 131, 50 Minn. 53, it was said by Gilfillan, C. J.: "The agent is held to the uttermost good faith in the business of his principal; and, to secure this, he is not permitted to place himself in a position antagonistic to the interests of his principal, nor to secure any advantage to himself from the business, without the full and free consent of the principal."

The defendant had for about 10 years been plaintiff's agent at St. Paul, Minn. After this long-continued relationship had ended, Mr. Prince caused to be canceled a large number of plaintiff's policies, and offered in justification of such action that it had the sanction of a local custom in that city, claiming the recognition of the very extraordinary rule that, in the mutual interest of principal and agent, the former was subordinate to that of the latter; that the risks procured by the agent were his property, to the extent of being subject to his control. In respect to this claim the court said: "There could be no question that pending his agency an agent of an insurance company, authorized to issue policies, cannot, without the consent of the company, treat the business represented by policies issued through him as in any sense his business, or the business of any one but his principal; and, if he had any authority to cancel policies, he could only exercise it for the benefit of his principal. A usage that he might cancel policies for his own advantage would be so subversive of all the principles underlying the rules of the law of agency as to be void."

¹⁷ 19 N. Y. 9.

time when the order was actually received by him through the mails.

It was said in *American Steam-Boiler Ins. Co. v. Anderson*¹⁸ that "the power of an agent to create rights by contract for his principal includes an implied duty to observe, and not to defeat or destroy them."

In this case *Anderson & Stanton*, as agents of the *American Steam-Boiler Company*, had issued policies to the *Messrs. Hoe & Co.*, and collected a premium of \$1,125. Of this sum they had appropriated their commissions, 30 per cent. Afterwards, the agency being terminated, *Anderson & Stanton* were appointed agents of the *Hartford Steam-Boiler Company*, and while thus engaged induced *Messrs. Hoe & Co.* to surrender their policies in the *American Steam-Boiler Company* for cancellation, and have the risk rewritten in the *Hartford company*. The action was brought by the *American Steam-Boiler Company* to recover damages on account of the immolation of its business, and having the further object of compelling the defendants to return the commission they had originally been paid on the premium. It was held that the commission must be refunded. This decision, it seems, was made to rest on the ground that the compensation of *Anderson & Stanton*, as agents of the plaintiff, was not for merely placing the risk; that their commission was 30 per cent of the whole premium, and extended, therefore, to the full term for which the policy was written. While this would not create an obligation to protect plaintiffs from depredation of other agents, they could not themselves be permitted to perform any act that would have the effect to deprive the *American Steam-Boiler Company* of the proper fruits of the efforts which they had put forth as its agents, and for which they had received full consideration.¹⁹

When an agent colludes with the insured to defraud his principal,

¹⁸ 6 N. Y. Supp. 507.

¹⁹ 139 N. Y. 134, 29 N. E. 231.

When the agent, actuated by malice, or from considerations of personal advantage, enters upon a course of action that results to the injury of his principal, he will be held to the latter for damages. 1 *Pars. Cont.* p. 93. says: "It may be regarded as a prevailing principle of law that an agent must not put himself, during his agency, in a position which is adverse to that of his principal; for, even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the exercise of all

the latter will not be bound. The law requires good faith on the part of an agent, and will not permit him to act in flagrant disregard of his principal's interests. When misconduct of this kind arises, the courts apply the rule that the agent becomes the agent of him whom he collusively serves,—a rule containing a good deal of "punitive justice," and one wisely intended to discourage offenses of this character.²⁰

the skill, ability, and industry of the agent, and he is entitled to demand the exertion of all that in his favor."

And Story on Agency (page 239) is here referred to as sustaining this general proposition. He says: "In this connection, also, it seems proper to state another rule in regard to the duties of agents, which is of general application; and that is that, in matters touching the agency, agents cannot act so as to bind their principals, where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration that the principal bargains in the employment for the exercise of a disinterested skill and diligence of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal as far as he lawfully may; and even if impartiality could possibly be presumed on the part of the agent, where his own interests were concerned, that is not what the principal bargains for, and in many cases it is the very last thing which would advance his interests."

Where the insurance agent has authority to terminate a risk, by cancellation, when it appears that he will be promoting the interests of his company by doing so, he will not be permitted to use this privilege to the injury of his principal, or for his own benefit. Should it occur that he has received intimations that his agency will soon be withdrawn, and thereupon engages in an indiscriminate cancellation of the company's business, rewriting the risks with other companies, the agencies of which he may hold with more confident expectation, such action will clearly be in violation of his obligation, and create a liability to the principal for any damages he may sustain on account of the loss of his business, or on account of the loss of reputation through the creating of distrust which the action of the agent might occasion.

²⁰ In *Centennial Mut. Life Ass'n v. Parham*, 80 Tex. 518, 16 S. W. 316, the court found that the agent of the plaintiff conspired with the defendant's wife (who was adjudged to be his agent in the transaction) to defraud the insurance company by inserting in the application false statements in regard to the health and habits of the applicant. The court held that such conduct was in fraud of the plaintiff, and had the legal effect to so change the relations of the agent that the defendant, and not the plaintiff, was bound by his acts. The court said on page 319, 16 S. W., and page 526, 80 Tex.:

§ 39. Agent cannot Delegate his Authority to Another.

The general rule of law is that an agent cannot delegate his authority to another. It is presumed that the principal, in the selection of an agent, has been governed by considerations of personal fitness in respect to the duties to be performed, and hence has come

"It is ordinarily true that a principal is affected with notice of such facts as come to the knowledge of his agent in the course of his business. When an agent, however, ceases to act for his principal in good faith, and through collusion with another, desiring through him to cheat and defraud the principal, practically enters into the service of that other for the purpose of promoting the interest of that person, or the common interest of himself and that other, in fraud of his principal, then the person who so avails himself of the service of such agent cannot claim that his acts or his knowledge in reference to matters to which the fraudulent collusion relates are binding on the person intended to be defrauded. In such a case the agent *pro hac vice* becomes the agent of the person whom he collusively serves. In *National Life Ins. Co. v. Minch*, 53 N. Y. 150, it was claimed that the medical examiner for the company, in collusion with an applicant, made a false statement as to her condition, to obtain a policy, and in that case, as in this, it was claimed that the company was chargeable with a knowledge of the true condition of the applicant, because its examiner knew it; but in disposing of the question the court held that: 'If Dr. Potter, the husband, and deceased knew that the latter had an incurable cancer, and acted in concert in procuring the policy, the plaintiffs were entitled to recover. Even if the company would otherwise be chargeable with the knowledge of Dr. Potter as their agent, they would be relieved from it under such circumstances. If a person colludes with an agent to cheat the principal, the latter is not responsible for the acts or knowledge of the agent. The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal.'"

The court here refers, in support of its position, to the case of *Smith v. Insurance Co.*, 24 Pa. St. 320, 4 Benn. Fire Ins. Cas. 43. In that case there was an application in which it was stated that the building insured had a chimney, and that the pipe from the stove passed through a crock, and was well secured. On the trial of the case it was in proof that the facts were otherwise, and that it was so understood by the agent of the company and the applicant at the time the insurance was negotiated. Under instructions from the court, the verdict of the jury was for defendant, and judgment entered accordingly. This was affirmed by the supreme court of Pennsylvania. From the opinion handed down by Woodward, J., we quote

the maxim, "Delegatus non potest delegare." This rule must have such reasonable application as to fairly recognize the exigencies of the many large transactions that have the daily and hourly attention of agents only. The operation of railroads, insurance offices, and the larger mercantile and manufacturing establishments, is chiefly under the management and control of agents. A person occupying the relation of agent to the proprietor of an important business may, and often does, find it necessary to employ many others, both in co-ordinate and subordinate departments, each sharing some measure of the responsibility of the management, and often compelled, from the nature of circumstances, to act independently, and on their own judgment of what will best promote the interests they have been appointed to conserve. Whether or not, from the nature of the employment, an agent's clerks and employés may, in certain cases, per-

as follows: "The familiar principle of law and morals which requires of an agent that he be found faithful to his trust is all-sufficient to justify the ruling of the court below. If it should be granted that this case is distinguishable from *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. 348, 2 Benn. Fire Ins. Cas. 339, and that the agent acted as the representative of the company alone, and in no sort for the assured, what right, it may be asked, had the plaintiff to collude with him, and obtain from the company an insurance upon false representations? The principal is bound by the acts of his agent, while he acts within the scope of the deputed authority; but if, departing from that sphere, or continuing in it, he commits a fraud upon his principal, a particeps criminis shall not profit by the fraud. A merchant's clerk colludes with a customer, and discharges his account without payment, or on receipt of less than is due; does anybody imagine that the merchant is bound by such a settlement? Because he was the agent of his master, and acting within the circle of his appropriate duties, a stranger or an innocent party might hold the master concluded; but not he who, tempted to the fraud, shared in its perpetration, and sought its fruits. The principle is susceptible of a great variety of illustrations, but is so obviously sound as to stand in no need of them."

In *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85, 4 Benn. Fire Ins. Cas. 96, an agent of one company renewed a risk in another company, of which he was a director and secretary; and the second contract was held voidable, on the ground that a person cannot be the agent for both parties to a contract. In discussing the principles of law involved, Denio, C. J., said: "It has been settled by a long course of adjudication in the courts of equity that a trustee or agent of one person cannot make valid contracts respecting the subject-matter to which the trust or agency

form in the agent's name, but in the principal's behalf, in respect to such particulars, concerning the regular transaction of business, as to bind him by their acts, is a matter in regard to which the courts have not been wholly in accord. The question was before the Alabama court in the case of *Waldman v. North British & M. Ins. Co.*²¹ The policy there contained a stipulation that it should become void "if the assured shall have, or hereafter make, any other contract of insurance, whether valid or not, on the property insured, without the consent of the company written hereon." The defendant claimed a forfeiture because of the other insurance referred to. Mr. E. B. Joseph was local agent of the defendant, and was also president of the Capital City Insurance Company. He employed as clerk one Gay, whose duties, it appears, related to the business of both companies, whenever and wherever they could be performed to the greatest

relates, where he has a personal interest. His constituents, it is said, are entitled to have all his skill and judgment employed in their service; but, if he is himself the other party to the contract, the utmost which could be expected from a very honest man would be the ordinary fairness of an umpire. The English cases are for the most part collected in *Paley's Principal and Agent*, by Lloyd (page 33 and the notes). The courts of this state have followed the principle of these cases with great constancy, and the rule may be considered perfectly well settled. *Torrey v. Bank of Orleans*, 9 Paige, 663; *Van Epps v. Van Epps*, Id. 237; *Hawley v. Cramer*, 4 Cow. 736; *Bostwick v. Atkins*, 3 N. Y. 53. It is not necessary for a party seeking to avoid a contract on this ground to show that an improper advantage has been gained over him. It is at his option to repudiate or to affirm the contract, irrespective of any proof of actual fraud. * * * The parties to the contract in this case are both corporations, and must, of course, transact their business through the instrumentality of agents, and Mr. Stevens was the agent of both parties. The plaintiffs were entitled to all his skill and ability, and the defendants had the like claim upon him. Neither required the services of an indifferent person, whose object might be to secure equal advantages to both the contractors. No one will contend that he, as the defendant's agent, could have made a contract to insure himself; but his duty to the plaintiffs required that he should act in their behalf with all the sagacity and discretion which a fair man would have exercised in his own business. There was therefore a manifest inconsistency in his attempting to negotiate this insurance as the agent for the insurer and the insured. * * * It is unnecessary to go to the length of saying that there was no contract in strictness of law."

²¹ 91 Ala. 170, 8 South. 666.

satisfaction of his employer, Mr. Joseph. It was claimed by the plaintiff that Gay had notice of the other insurance, and had waived the forfeiture. The court held that Gay was not the agent of the company, although he was authorized by Joseph to fill out policies, and sometimes to issue them, signing Joseph's name with a stamp. We quote from the opinion: "Gay was in no sense the agent of the defendant, nor authorized to bind it in any degree, nor was it affected by the alleged notice to him of the additional insurance."

In *Mechem on Agency* ²² we find: "If an agent employs a sub-agent for his principal, and by his authority, expressed or implied, then the subagent is the agent of the principal. * * * But if the agent, having undertaken to transact the business of his principal, employs a subagent on his own account, to assist him in what he has undertaken to do, he does so at his own risk, and there is no privity between such subagent and the principal. The subagent, therefore, is the agent of the agent only, and is responsible to him for his conduct, while the agent is responsible to the principal for the manner in which the business has been done, whether by himself, or by his servant or his agent."

In another section ²³ the same writer says: "If the subagent be one whom the agent was expressly or impliedly authorized to appoint, he is to be deemed to be the agent of the principal, and notice to such subagent would be notice to the principal, as in the case of other agents; but, if the subagent be the agent of the agent merely, then there is no privity between him and the principal, and his knowledge cannot be imputed to the principal." ²⁴

²² Section 197.

²³ Section 728.

²⁴ In *Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co.*, 33 Pac. 633, 98 Cal. 557, it was held that the insured was bound by the act of his bookkeeper, when acting within the scope of his authority.

Held, that an agent may exercise his powers through his clerk, in such manner that his acts in the performance of accustomed duties, such as accepting risks, delivering policies, and collecting premiums, will bind the company; that the act is to be construed as that of the agent through the instrumentality of another; that the maxim, "*Delegatus non potest delegare*," does not apply. *Hartford Fire Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. 685.

Agent's clerk knew of incumbrances when the insurance was negotiated. This clerk had the whole management of the office, but did not sign policies. Held, that the knowledge of the clerk was the knowledge of the company, and

In the settlement of loss claims, a high order of talent is often required. Adjusters are selected on account of their special knowledge of values; their familiarity with methods of conducting, in each detail, many kinds of mercantile and manufacturing operations. The important interests committed to the adjuster's care imply confidence based on exceptional integrity, and the absolute command of all their reserved moral and mental forces. Duties which agents of this class are employed and paid to perform obviously cannot be referred to others without the consent of the principal.²⁵

§ 40. Statutory Provisions Concerning Agency.

In several states (notably, Illinois and Wisconsin) it is provided by statute, under different form of words, that any person who may have had anything to do in procuring the insurance taken shall be considered the agent of the company. Without usurping legislative functions, the courts, by "construction," have generally been able to preserve a decent respect for the statute, and at the same time prevent any substantial wrong being done on account of a too rigid adherence to its letter. This balancing and conserving tendency is clearly shown by Judge Cassoday in stating the opinion of the court in the case of *Hankins v. Rockford Ins. Co.*²⁶ He said: "The statutes declare that 'whoever' does one of the several things therein mentioned shall be held an agent of such corporation, to all intents and purposes." But such agency, after all, he adds, "is limited to the act of the particular person in doing one or more of the things thus specially designated." In other words, whenever an insurance company authorizes any person to do any one of the things thus specified, it cannot disclaim the agency of such person

that estoppel would apply. *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13, 26 S. W. 763; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 South. 46; *McGonigle v. Insurance Co.*, 31 Atl. 875, 168 Pa. St. 1; *International Trust Co. v. Norwich Union Fire Ins. Soc.*, 17 C. C. A. 608, 71 Fed. 81; *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 1 S. W. 689; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100; *German Fire Ins. Co. v. Columbia Encaustic Tile Co.* (Ind. App.) 43 N. E. 41; *Goode v. Insurance Co.* (Va.) 23 S. E. 744.

²⁵ *Ruthven v. Insurance Co.* (Iowa) 60 N. W. 663.

²⁶ 70 Wis. 1, 35 N. W. 34.

in the doing of anything necessarily implied in the specific act thus authorized. A stranger to the company may not, therefore, complicate by his acts an important business undertaking, as this Wisconsin statute has generally been understood to permit. By judicial construction the word "whoever," in the Revised Statutes of Wisconsin,²⁷ now means only "an authorized agent of the company." The law is rendered innocuous, and its provisions reconciled with the intelligent processes of conducting business, and of preserving our natural rights in the ordinary affairs of life. Agents in Wisconsin, under this decision, it will be seen, have no larger powers than elsewhere. Agents in every state, who are authorized to make contracts of insurance, may do the things necessary to create an obligation that shall express the true intention of the parties, and such as will secure the full measure of indemnity agreed upon. The party negotiating for insurance, without notice of any limitations of the agent's authority, may safely proceed to deal with him concerning matters that are apparently within the scope of his powers as an agent for making contracts to insure, but no further.

§ 41. Agent of Both Parties.

An agent may act for both parties to a contract when in doing so he is not required to assume incompatible duties, or when he is acting under such definite and specific instructions from either of the principals as will cause him to be charged with responsibility only in regard to the other. This rule is well illustrated in a recent case of *North British & M. F. Ins. Co. v. Lambert*.²⁸ The action was brought to recover from an agent who had failed to comply with instructions to cancel a policy on which subsequently a loss occurred. The defendant pleaded that he had not been in default in performing under the orders given by plaintiff; that, acting as agent for the insured, he had made an oral contract with the officers of another company, for which he was agent, to accept the risk which the plaintiff had directed him to cancel; and that while the property had burned before the plaintiff's policy had been surrendered,

²⁷ Section 1977; *Honkins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34.

²⁸ 26 Or. 199, 37 Pac. 909.

and the other policy written and delivered, the hazard had in fact been transferred from one company to the other. The court said: "A contract made by an individual as agent of both parties is not void, but voidable only at the election of either principal, if made within a reasonable time. If the defendant did not assume to represent the insurance company in entering into the contract with it, but dealt with the officers, who were independent agents, and had authority to act for it, the contract, though oral, is binding upon the insurance company."

In the case of *Northrup v. Germania Fire Ins. Co.*²⁹ the property insured was in the general care of one Edwards, who was also the agent of the defendant company. Edwards had been instructed by the plaintiff to insure, but had neglected to do so until a few hours before the property was burned. It was set out, in answer to the action to recover, that Edwards, being the agent of both parties, was incompetent to make the alleged contract of insurance. The Wisconsin court held that Edwards' relations to the plaintiff, as his agent to collect rents, pay taxes, and look after the protection of the property generally, were not inconsistent with his duties as an agent in contracting insurance. It said: "We are cognizant of no rule of law which incapacitates an insurance agent thus intrusted with the care of property to write a valid policy upon it."

As a general proposition of law, an agent cannot act for both parties in a matter where the action imports discretion. Where there is no conflict of interest, and nothing to call for the exercise of judgment and skill, it is otherwise. Such appears to have been the opinion of Judge Earl, of the New York court of appeals, in deciding the case of *Empire State Ins. Co. v. American Cent. Ins. Co.*³⁰ He said: "An agent to sell for one party may also act as agent for the buyer, but only in case the price and terms of sale have been fixed by each party, so that nothing is left to his discretion; but an agent to sell, intrusted with a discretion, and thus bound to obtain the best price he can, cannot buy for himself as agent for another. In such a case he would occupy an antagonistic position, and there would be a conflict of interest. He could not serve one party without betraying the interests of the other. So

²⁹ 48 Wis. 420, 4 N. W. 350.

³⁰ 138 N. Y. 446, 34 N. E. 200.

jealous is the law upon this point that it will not even allow the agent or trustee to put himself in a position which, to be honest, must be a strain upon him."

In the case Judge Earl was considering, the agent had written \$2,500 in one company, for which he had an agency, and, on receiving instructions to either cancel or reduce the amount by reinsurance to three-fifths of the sum written, he reinsured \$1,500 in another company, for which he was also agent. It was held that he could not act in the dual capacity of the insurer and insured in the same transaction. Had both companies assented to the action of the agent before loss, the contract would have been good.

Where a person was employed as a bookkeeper in a manufacturing establishment, and had also the agency of several insurance companies, it was a part of his duty to his employers, the owners of the factory, to keep the property insured, which he did under policies of the companies for which he was agent; and it was held that he was agent for both parties. From the facts stated in the opinion filed in the case, the correctness of this decision may well be questioned. Agency implies both service and compensation, and in this instance, if the bookkeeper was authorized by the owners of the factory to place the insurance as a favor to him, they paying the full premium, and having no other benefits than they would have derived had the insurance been negotiated through another agency, it is not easy to see how the bookkeeper was in any just and legal sense the agent of the insured, as his compensation came wholly from the company.³¹ It seems a reasonable proposition that the

³¹ There will be found a discussion of this question by the supreme court of Indiana in the case of *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100. The insurance was procured through a Chicago broker, in a company represented by Mr. McGilliard, of Indianapolis. The broker was familiar with the property insured, had made a personal survey when taking application, but omitted to state to the Indianapolis agent, when procuring the policies, certain material facts affecting the hazard. The court held that as the broker received remuneration for his services, in commissions paid by the company, he must be held to be its agent, and not that of the assured.

But the courts do not all accept this test of agency. In the case of *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502, 7 Ins. Law J. 214, the court, in considering a state of facts so far analogous as to involve essentially the same principle, said: "It is no part of an insurance agent's duty to his company to look

party who pays for the service by such acknowledgment of obligation recognizes agency.

Where the agent of the insurance company was also a stockholder and vice president of the corporation insured, it was held that his relations to both companies disqualified him to act for either. This decision must rest on the fact of his official relations to one of the companies. His being a stockholder would not make it improper, on the ground of antagonistic interests, to deal with the

after the insurances of other persons, and all that he does in that way beyond what relates to insuring in his own company, in the usual course of business, and for premiums paid, is outside of his official character. As an insurance broker, he represents the insured, and not the insurer." So, too, in the case of *Tasker v. Insurance Co.*, 58 N. H. 469, the plaintiff had agreed with one Robinson, who was a duly-authorized agent of the defendant insurance company, to keep his property insured for the amount of \$3,000. In pursuance of this undertaking, he had written a policy in the Penn Company, which he subsequently canceled on their request, and wrote another for the same amount in the Kenton. The court said, "If this policy is not a contract made by Robinson as agent of both parties, it is not a contract made by anybody."

In *Sargent v. Insurance Co.*, 10 Ins. Law J. 852, 86 N. Y. 626, it appears that the plaintiff was the owner of a lot of cord wood, and Munger was attending to this department of his business. He also was engaged in insurance, and represented several companies. Sargent's instructions to Munger were to place \$1,800 insurance "in some good compsn'y," to which Munger assented, and thereupon wrote a policy for a short term, which expired before the fire occurred; and the question presented to the court was whether the parol agreement between Sargent and Munger that the property should be kept insured created a continued liability of the company in which the insurance had been written. It must be borne in mind that, when the agreement was made between Sargent and Munger to keep the property insured, no particular company was mentioned. The court said: "Munger could act in either of two capacities, or, at different stages of the transaction, in both. He could act as agent of the plaintiff, or agent of the defendant. The debate ends in the inquiry in which capacity he acted, and was understood to be acting, when the alleged agreement was made. It seems to us beyond reasonable doubt that he took upon himself the duty of an agent of the plaintiff, employed and promising to procure in the future, and keep available, such insurance as the plaintiff wanted, in some one of the companies which he reprcsented. * * * The facts indicate to us that the agreement with Munger was not at all in the character of agent of the company, but in that of an individual agreeing to act for, and as the agent of, the plaintiff." *Young v. Insurance Co.*, 59 Conn. 41, 22 Atl. 32.

The logic of each of the cases here referred to it is difficult to challenge, and

corporation, of which he was an attenuated member, as the agent of another party, even though there might be a distinct and active conflict of interests.

The fair application of the rule that a person cannot be the agent for both parties in the same transaction will, of course, prevent an agent having charge of the business of several companies reinsuring the risks of one company with another. Legal rules, like all others, lose their rigor when interrupting the natural and necessary course of business. In all the large insurance offices it is now the custom for reinsurances to be written in this way. This practice, it need not be explained, is with the full knowledge and consent of both parties. If to-day the courts do not indorse the custom, they will do so to-morrow. Such reasonable methods as the conveniences of business require will be conceded.³²

yet the agent in each instance presumably received his compensation from the companies, and not from the insured, whose agent he was held to be. It presents a question concerning which able judges clearly are not in accord.

There was paid to defendant by plaintiff the sum of \$5, for which the former agreed to procure for the latter an insurance of \$300 on a particular building, designated. The defendant was agent for several companies, no one of which was mentioned by either of the parties as the company to have the risk. The defendant did not perform, nor does it appear that he made any attempt to perform, his agreement. The property having afterwards burned, the court held that as no company had, before the fire, been designated, no company could be charged with the loss, and that in the matter of the agreement concerning the insurance the plaintiff and the defendant must be regarded as standing in the relation of principal and agent, and that as the defendant had taken his principal's money, engaging to procure the insurance mentioned, in default of doing so he must be charged with the loss. *Lindsay v. Pettigrew*, 52 N. W. 873, 3 S. D. 199.

An agent had control of a line of insurance, with full authority to make changes when desirable to do so, substituting the policies of one company for those of another. It was held that such agent had authority to receive notice of cancellation, notwithstanding he was the agent of both parties. This decision distinctly recognizes the doctrine that a person may be properly the agent of two or more parties, when acting under such definite instructions as to leave him no discretion. *Schauer v. Insurance Co.*, 60 N. W. 994, 88 Wis. 561.

³² An agent for an insurance company cannot make a valid contract with a corporation of which he is stockholder and vice president. *Greenwood Ice & Coal Co. v. Georgia Home Ins. Co.*, 72 Miss. 46, 17 South. 83.

Agent for two companies cannot reinsure the risks of one in the other. *Em-*

Where the agent of the insured is also agent for the insurer, and, in writing the policy, occupies a position that the law forbids, the insurance is not necessarily void. If the principal, when coming to an understanding of the situation, ratifies the act of the agent, the policy will then become a valid contract; and it has been held that, on the facts being made known to the company, it would be its duty to speak, and if it repudiate the insurance the premium must be returned. Failing to act promptly, the company would be liable should loss occur. Whether the policy is to be treated as void, or only voidable, good faith certainly will compel the insurer to return the premium, if on learning the facts he is unwilling to continue the engagement.³³

§ 42. May be Agent for Both Parties in Respect to Different Matters.

While a person cannot be the agent of both parties, having adverse interests in the same transaction, it will sometimes occur that a person may consistently represent as agent both parties—first one, and then the other—in different matters relating to the same business. Thus, Brown, we will suppose, owns a mill which he

pire State Ins. Co. v. American Cent. Ins. Co., 34 N. E. 200, 138 N. Y. 446; *British-American Assur. Co. v. Cooper* (Colo. App.) 40 Pac. 147.

In the case last cited the agents of the insurance company were also agents of the defendant in error for particular purposes. They had the supervision, during the construction, of the building insured, and, after its completion, had charge of it for purposes of renting. With the performance of these two specific duties, their agency terminated. The owner of the building requested them to insure it in some company for which they were agents, which was done. Held, that they were not the agents of the owner of the property for procuring the insurance; that the owner had acted in his own behalf in negotiating the insurance,—that is, had directed it to be written.

³³An agent insured property in which he was part owner. The court held that it was incompetent for an agent to act when his own interest was in conflict with that of his principal, but that a policy so issued was only voidable, and that it was the duty of the company, on learning the fact that their agent was the person insured, to at once repudiate the insurance and offer to return the premium, and, failing so to do, they would be estopped from denying the validity of the policy. *Hanover Fire Ins. Co. v. Shrader* (Tex. Civ. App.) 31 S. W. 1100.

wishes to insure for \$50,000. Benson is an acquaintance who has the agency of a single company. Brown requests Benson to procure for him the whole amount of insurance desired, but the company for which Benson is agent will not accept of the risk a sum greater than \$5,000. Benson prepares the necessary surveys and applications, writes a policy for \$5,000 in the company for which he is agent, and places the remainder with other companies. That Brown has made Benson his agent for procuring this insurance is a matter too plain to admit of any doubt, as to the amount written in companies other than the one for which Benson was agent; and, in respect to that one, Benson was Brown's agent in the preparation and presentation of the application, survey, and other data on which the policy was issued. Brown would be held responsible for the accuracy of the survey, and the truth of all material statements contained in the application furnished the company. And so, too, where the agent of the company has authority only to solicit risks, take applications, and forward them to the general agent of the company for examination and approval. When this duty has been performed his connection with the transaction in behalf of the insurer is terminated, and he may subsequently act in the same manner for the insured with as much propriety as any other person could do.³⁴ The consideration of these questions requires careful distinctions, and in determining the true relation of parties, in harmony with settled legal principles, courts often disagree.

§ 43. Distinction between Broker and Agent.

In *Arff v. Star Fire Ins. Co.*³⁵ there is found an extended and eminently instructive discussion concerning the manner, and under what limitations, an insurance company may be bound by the acts of certain persons, not designated by it as agents, but who have an implied authority to act in particular cases on account of their relations to the company's business. The application in that case was taken by one Strecker, who had a desk in the office of the agents of the defendant company, whose names were McDonald & Van

³⁴ *East Texas Fire Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. 572.

³⁵ 125 N. Y. 57, 25 N. E. 1073.

Alstyne. A policy was issued by the defendant on the application mentioned, and subsequently other insurance was obtained, of which notice was given to Strecker. The contention of the defendant was that S. had no authority to receive notice, not being an agent or officer of the company. The evidence showed conclusively that Strecker worked entirely for McDonald & Van Alstyne, who paid him a commission on the business brought to their office. The court, in its discussion of the case, says that, if Strecker was to be regarded as a broker, notice of the other insurance communicated to him would not be sufficient to save a forfeiture.³⁶ It then proceeds to define the character of a "broker." We quote from the language of the opinion: "What is understood under the designation of an 'insurance broker' is one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company; but, having secured an order, he either places the insurance with the company selected by the insured, or, in the absence of any selection by him, then with the company selected by such broker. Ordinarily the relation between the insured and the broker is that between the principal and his agent; and, according to Arnould on Insurance,³⁷ 'the business of a policy broker would seem to be limited to receiving instructions from his principal as to the nature of the risk, and the rate of premium at which he wishes to insure, communicating these facts to the underwriter, effecting the policy with them on the best possible terms for his employers, paying them the premium, and receiving from them whatever may be due in case of loss.'"

The court then distinguishes the case under consideration from those of *Mellen v. Hamilton Fire Ins. Co.* and *Devens v. Mechanics' & Traders' Ins. Co.** In both these cases the brokers who effected the insurance were not in the employ of the company which insured the property. They were free to place their risks wherever they could do so with advantage to themselves, and to the satisfaction of their patrons. Their connection with the insurer was such that when the policies were delivered, and the premiums collected, neither owed any further duty to the other, and their business relations

³⁶ *Mellen v. Insurance Co.*, 17 N. Y. 609; *Devens v. Insurance Co.*, 83 N. Y. 168.

³⁷ Volume 1 (2d Ed.) p. 108, c. 5.

*17 N. Y. 609; 83 N. Y. 168.

wholly ceased. While Strecker, who obtained the insurance for plaintiff in this suit, occupied the position of a clerk or employé in the office of the agents who issued the policy, the fact that his compensation consisted of commissions on his business, instead of a salary, had no important significance in the opinion of the court; and the conclusion reached was that, Strecker being a clerk of the agents McDonald & Van Alstyne, the oral notice given to him of the other insurance would be sufficient to prevent a forfeiture.³⁸ This decision is based on the somewhat questionable proposition that an agent has the power to so far delegate his authority that the clerks employed in transacting the ordinary business of his agency may bind the company for which he acts, by waiver of the conditions of the policy, as effectually as the agent could do in person.

In support of this doctrine, reference is made to *Bodine v. Exchange Fire Ins. Co.*³⁹ Earl, C. J., said: "We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payments of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim, '*Delegatus non potest delegare*,' does not apply in such a case."⁴⁰

And we find opinions to the same general effect in *Clark v. Glens Falls Ins. Co.*,⁴¹ and in *Kuney v. Amazon Ins. Co.*⁴² In the last case the supreme court of New York held that the acts of the agent's employés in making contracts, and in doing all other things necessary to be done in the dispatch of business, would bind the company the same as if done by the agent in person. From these decisions it appears that the courts of New York are strongly committed to the rather perilous doctrine that a person unknown to the com-

³⁸ *McEwen v. Insurance Co.*, 5 Hill, 101, approved in *Wilson v. Insurance Co.*, 14 N. Y. 418.

³⁹ 51 N. Y. 123.

⁴⁰ Story, Ag., § 14.

⁴¹ 21 N. Y. Wkly. Dig. 197.

⁴² 36 Hun, 66.

pany, and one often, too, without experience or business judgment, may waive forfeitures, and assume important obligations, without its consent, or even its opportunity to enter a protest.

§ 44. Broker Frequently the Agent of Both Parties.

The relations of an agent will often depend upon the nature and circumstances of the duties he undertakes to perform. His constancy and good faith cannot be impeached, although in the same transaction, at different times, and even at the same moment of time, in separate and distinct parts of the same matter, he represents both parties,—first one, and then the other. Care, of course, must be taken, in the duality of his relations, to avoid inconsistency, and to fully protect confidence.

This rule of law was well illustrated in the case of *Sellers v. Commercial Fire Ins. Co.*⁴³ The evidence there showed that plaintiff went to the office of Trimble & Co., brokers, to procure insurance, and to them represented the character and location of the property to be covered. Trimble & Co. filled up a blank application, which was signed by plaintiff, and afterwards by Trimble & Co. presented to the agents of the defendant company, who wrote and delivered the policy in suit. For their compensation, Trimble & Co. received from the defendant's agents a part of the commission usually paid to the latter for business of the same class. By the terms of application, the statements which it contained were made warranties, and as some of these were untrue a forfeiture was claimed. This the plaintiff sought to avoid by estoppel, and offered to show that he made true statements to Trimble & Co., and that the error in filling the blank spaces in application was that of the company's agent. This testimony was excluded on the ground that the brokers, Trimble & Co., were agents of plaintiff, and that knowledge to them was not knowledge to the company. The Alabama court, after reviewing the case, said that it was difficult to conceive that the plaintiff "did not wholly rely upon Trimble & Co. as their agents; and, if they were negligent or unfaithful in the performance of duty, it is to them the plaintiff must look for re-

⁴³ 105 Ala. 282, 16 South. 798.

dress of whatever loss or injury they may have sustained. The misdescription of the location of the storehouse was either the act or fault of the plaintiffs, or of their agents. Whether the one or the other, it cannot avoid the warranty in the application."

When Trimble & Co. were intrusted by defendant with the delivery of the policy and collection of the premium, the agency was so changed that the broker represented for the time the insurers, instead of the insured, and, had Trimble & Co. collected and retained the money, it would not have excused the defendant from payment of the loss. When the insured had received the policy from the brokers, and paid to them the premium, the promise of the insurer did rest upon a consideration, and whether or not the money was ever paid over to the company by the brokers would be a matter of no concern to the insured.

In support of this doctrine the Alabama court said: "The delivery of the policy to Trimble & Co. for delivery to the plaintiffs in payment of the premium did not change their character and relations as agents of the plaintiffs. Thereby they were merely enabled to consummate their agency, and until its consummation the agency continued. Necessarily thereby they became agents of the defendant, limited in authority to the delivery of the policy and receiving payment of the premium. The payment to them of the premium was the equivalent of a payment to the defendant, rendering the policy a binding contract, even though they had not paid the premium to the defendant." ⁴⁴

In the case here cited by the Alabama court the policy, at the request of the broker, was sent to him to be delivered to the insured, and collection of premium made. Compliance with this request being had, the broker forwarded said policy to another person, with instructions to deliver same to insured and collect the premium. These instructions were followed, but the person who had been delegated by the broker, having made collection of premium, retained it until after the occurrence of the fire which destroyed the insured property. Held, that the broker was the agent of the insurer, and that payment of the premium to the person whom he had appointed to receive it was payment to the company. ⁴⁵

⁴⁴Arthurholt v. Insurance Co., 159 Pa. St. 1, 28 Atl. 197.

⁴⁵Supra.

If the courts proceed on the very reasonable theory that the broker is the agent of him from whom he receives his compensation, we are then confronted with the problem, who pays the broker?

§ 45. Who Pays the Broker?

He usually receives the money from the insured, who always, of course, is primarily liable for it, either to the broker or the company. If first paid to the latter, the commission of the broker would be received by him from the company; but in the usual course of business the broker collects the premium from the insured, deducts his compensation, and pays the remainder to the company. It will be seen that the courts have held with great uniformity that in procuring the insurance the broker is to be regarded as the agent of the insured, that his agency then terminates, and that, in respect to subsequent transactions, he cannot be recognized as having any authority or responsibility whatever.

It has been held that notice given to broker of incumbrances would not be knowledge to the company, whose agent he was only, for the purpose of delivering the policy and collecting the premium. Where there was an apparent authority on the part of the agent to act, and information that such authority did not exist having been communicated to the broker, it did not impute knowledge to the insured, by whom the broker was employed.⁴⁶

⁴⁶ Broker is agent for company only for delivering the policy and collecting the premium. Information communicated to the broker in regard to incumbrances will not be knowledge to company. *Gude v. Insurance Co.*, 53 Minn. 220, 54 N. W. 1117.

At the request of the broker, the agent indorsed consent for incumbrance and foreclosure proceedings. At the same time the agent informed broker that he had no authority to make such indorsements. It was held that agent's statement, so made, that he exceeded his actual authority in indorsing the company's consent to incumbrance and foreclosure, was not notice to the insured, who might presume that what the agent did was done with authority. *Miller v. Insurance Co.*, 101 Mich. 49, 59 N. W. 439.

The broker first solicited the insurance from H. & Co., who declined to place the risk in their own companies, because of its objectionable character. The broker then, through other parties, obtained a policy in defendant company. Held, that the broker was the agent of insured. *Fromherz v. Insurance Co.* (S. D.) 63 N. W. 784.

The insurance was placed by one Langguth, a broker. Afterwards the com-

§ 46. Authority of Broker to Consent to Cancellation of Policies.

When an agent or broker, as it frequently happens, is charged with keeping a particular property insured, without being required to report specifically to his principal, the owner, the names of the companies in which the insurance is placed, having full authority to select such policies as he may deem satisfactory, such person will be held to have general powers in reference to any matters concerning the placing of such insurance, and may accept notice of cancellation, substitute the policy of one company for another, and bind his principal by waiver, or express agreement in writing or by parol.

In *Buick v. Mechanics' Ins. Co.*,⁴⁷ plaintiffs arranged with one F. O. Davenport, an insurance broker, to take care of their insurance. This relation had continued for several years. Plaintiffs were not familiar with insurance contracts, and referred every detail of that

pany telegraphed its local agent, Fox, to cancel. Fox gave the telegram to Langguth, and requested him to take up the policy, which he agreed to do, but did not. Held, that notice to the broker was not sufficient, as no actual notice was received by the insured. *Snedicor v. Insurance Co.* (Mich.) 64 N. W. 35.

Held to be a question of fact, for the jury, whether payment to the broker was payment to the company. *Estes v. Insurance Co.* (N. H.) 33 Atl. 515.

Broker cannot consent to assignment of policy. *Richmond v. Assurance Co.*, 88 Me. 105, 33 Atl. 786.

Because the insurer delivers the policy to the broker, and intrusts him with the collection of the premium from which his commissions are deducted, is not conclusive of agency. *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Royal Ins. Co. v. McCrea* (Tenn.) 8 Lea, 531, 11 Ins. Law J. 508.

When a broker requests a policy for the use and benefit of his principal, and it is written and delivered as requested, the policy cannot afterwards be returned for cancellation without the consent of the insured. *Bennett v. Insurance Co.*, 115 Mass. 241.

In New York the broker was treated as having authority, as agent of the insured, to surrender a policy for rescission or substitution. *Standard Oil Co. v. Insurance Co.*, 64 N. Y. 85.

And the same court holds that the agency of the broker ends with the delivery of the policy. *How v. Insurance Co.*, 80 N. Y. 32; *Devens v. Insurance Co.*, 83 N. Y. 168.

⁴⁷ 102 Mich. 75, 61 N. W. 337.

department of their business to the broker Davenport. They designated the amount of insurance to be written, but left all else to the discretion of their agent or broker. The policies, however, were always sent to plaintiffs. About the middle of August, 1892, Davenport was instructed to procure \$4,000 insurance on the contents of a particularly specified building. This order was promptly executed, and \$1,000 of the amount named was placed with the Michigan Fire & Marine Insurance Company. No premium on this policy was ever paid. Some two weeks later the Michigan Fire & Marine telephoned Mr. Davenport that they wished to cancel. He replied "Very well," and on the same day rewrote the insurance in the defendant company through its authorized agents at Detroit. Of this fact the Michigan Fire & Marine was an hour or two later informed. Three days afterwards the property burned, and the Mechanics' Insurance Company declined to pay. The trial court found, as matters of law, that Davenport, acting within the scope of his authority as agent for plaintiffs, could substitute one policy for another, and that his action in this regard made the policy in suit a valid and subsisting contract at the time of the fire. The supreme court of Michigan, sustaining this finding, said:

"The plaintiffs entrusted the whole subject of the insurance to Davenport, and had done so for years. They did not even know in what companies they were insured. The Michigan Company dealt with the broker, Davenport, alone. He assented to the cancellation, obtained the new policy now in suit to take the place of the Michigan policy, and delivered it to the plaintiffs before the fire, with notice of the cancellation and the substitution. Plaintiffs received it, but did not open the envelope containing it, and it was consumed in the fire. We think this case is clearly within *Hartford Fire Ins. Co. v. Reynolds*,⁴⁸ in which it is said, 'It is certainly not necessary to give notice to the principal who deals through a broker, who is notified.' The Michigan policy provides for cancellation upon five days' notice. This provision, however, can be, and in the present case was, waived, by the assent of both parties to the contract. Such waiver did not affect or change the defendant's liability. If the parties to the Mich-

⁴⁸ 36 Mich. 502, 507; *Dibble v. Assurance Co.*, 70 Mich. 1, 37 N. W. 704.

igan Company's policy saw fit to waive the provision, the defendant cannot question it."

It will be observed that the court mentions in this case that no premium had been paid the Michigan Fire & Marine, but does not intimate in what respect this fact has any significance as affecting the rights of either of the parties to the litigation. It is quite clear that the court was in no way influenced in its judgment by any considerations concerning the premium. The real question involved was determined by the important fact of Davenport's power to act for the insured, without special instructions, in regard to the substitution of the Mechanics' policy for that of the Michigan Fire & Marine.

The same rule of construction is found in *Schauer v. Queen Ins. Co.*⁴⁹ The plaintiffs there owned a gristmill, on which they had been accustomed to carry a large amount of insurance. A part of this was written in companies for which Warren & Son were agents. On account of the uncertainty and inconvenience in dealing with different agents in respect to a matter with which they were not wholly familiar, plaintiffs in the fall and winter of 1892 requested Warren & Son to take charge of all their insurance on the mill, stating the amount to be carried, but it does not appear that any instructions were given as to what particular companies the risk should be placed with. Warren & Son agreed to keep the property insured. Among the policies procured was one of \$1,500 in the Oakland Company, which was ordered canceled by the insurer early in January, 1893. This policy was replaced by Warren & Son, they writing another with the defendant in this suit for the same amount. About January 13th plaintiffs were notified by Warren & Son of the substitution of the Queen for the Oakland policy, and to this they expressed their satisfaction. On January 14th the manager of the defendant company at Chicago wrote Warren & Son to immediately retire their policy. This letter came by course of mail to the hands of Warren & Son on January 15th, and on January 19th they entered a cancellation of the policy on their agency record; and it appears that thereafter they diligently sought to

⁴⁹ 88 Wis. 561, 60 N. W. 994.

replace the insurance with other companies, applying through their correspondents at Chicago, Green Bay, and possibly elsewhere, but before any arrangements were consummated the fire occurred, on January 25th. In delivering the opinion of the court, Judge Casoday said:

“The only question presented is whether the policy was effectually canceled by the notice so given to Warren & Son, under the clause of the policy which provides that ‘this policy shall be canceled at any time at the request of the assured, or by the company by giving five days’ notice of such cancellation.’ The only objection to the notice is that it should have been given to the plaintiffs personally, instead of Warren & Son, but we are clearly of the opinion that the trial court was right in holding, as a matter of law, upon the undisputed evidence that the business arrangements between Warren & Son and the plaintiffs in reference to their insurance authorized Warren & Son to receive such notice of cancellation. * * * Upon the facts stated, we must hold that the duties of Warren & Son to the defendant and to the plaintiffs were in no sense repugnant.”⁵⁰

A careful distinction should be observed between brokers who are only authorized to procure policies of insurance on specified property to a stated amount, in designated companies, and those whose agency extends to the exercise of a discretion as to what policies shall be accepted, and what rate of premium paid. In the first case the broker has but one duty to perform, the procuring of the policies, and turning them over to the insured. When this is done, in most cases, the agency is terminated, and notice to the broker of cancellation, or of any other matter affecting the action of the parties, will not charge the insured with knowledge. But the rule is different in respect to the second class mentioned. The agency there is of a larger scope, and more general character. The requirement is not to obtain policies to a certain amount, but to keep the property insured in responsible companies. This imports a measure of freedom and permission to exercise important discretionary powers, and while these relations continue, although the broker may

⁵⁰ Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502; Stone v. Insurance Co., 105 N. Y. 543, 12 N. E. 45.

be only a special agent of the insured, it is clearly within the apparent scope of his authority, to bind the insured by accepting notice of cancellation, and by surrendering one policy and replacing the insurance thereunder with a different company. The responsibility and rights of the parties concerned will not be essentially changed when the person selected by the property owner to take charge of his insurance business holds the appointment as agent of various insurance companies, and has authority from them to make contracts to insure, to write and deliver policies. The same rule of law above explained as applicable to brokers will control the conduct of persons who are the acknowledged agents of both parties, qualified only by the fundamental principle of agency that a person sustaining a relation of confidence and fidelity to both parties will not be permitted to act when judgment is required or interests conflict.

In *Stone v. Franklin Fire Ins. Co.*,⁵¹ Longford & Co. were the agents of the defendant, who wrote the policy. They were dealing with a broker named Frank. On the 26th of February these agents wrote Frank that the defendant wished to cancel the policy in suit, and that they would do so at noon of the 28th of that month. As there had been no premium paid, the court held that defendant had no duty to perform in that respect. The policy was issued to the Standard Tinware Company, and before suit was assigned to the plaintiff, Stone. The court said: "We are of the opinion that, upon the undisputed evidence, Frank was so far the agent of the tinware company that notice to him was notice to that company. He had been the agent of the tinware company for about two years, through whom it procured insurance upon its property from various companies, in all to the amount of \$10,000. It does not appear that he received any particular instructions as to the companies from which he was to receive insurance, or as to the rates of premium or the amount to be insured in any particular company. It is inferable that all these matters were left to his discretion."

It should be noted that the president of the tinware company at the trial testified that Frank was not his agent,—only a broker whom he had authorized to obtain the insurance. Frank also stated in

⁵¹ 105 N. Y. 543, 12 N. E. 45.

evidence that "he had nothing to do but to place business as Scheider [the president of the tinware company] ordered him to do." The court characterized this testimony as mere expressions of the witness' opinion, and without such legal effect as to impair the force and significance of the other evidence offered, which it thought sufficient to fully establish the agency of Frank. It said, "If, upon the evidence, the jury had found that Frank was not authorized to receive notice, their verdict would have been so far contrary to the evidence that it would have been the duty of the trial judge to set it aside."

The broker is held to the same measure of good faith in performing as any other class of agents, and when he accepts a premium, and undertakes to procure insurance, and neglects or fails to perform his engagement, he will be charged with the loss, should one occur.⁵²

An agent or broker who procures for his principal or client a pretended insurance in a company known to be insolvent, or having no real existence, will himself be treated as the insurer, and charged with the payment of any loss occurring under such alleged policy.⁵³

§ 47. When Knowledge of Agent is Imputed to Principal.

It is a theory of the law sometimes sustained by the courts that an agent is his principal's alter ego. When this doctrine is accepted, it logically follows that knowledge had by the agent, no matter when or how possessed, is knowledge of the principal, and the latter must be presumed to have acted in reference to it in any transaction to which it relates.

This was held in *Advertiser & Tribune Co. v. Detroit*.⁵⁴ *Marston*,

⁵² The broker procured an insurance, as he had engaged to do, received from his principal the premium, but neglected to remit in payment of the policy. A loss subsequently occurring, the insurer denied liability, on the ground that there was no consideration. Held, that the broker was liable to his principal for the damage sustained. *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101.

⁵³ A broker fraudulently pretended to insure his client in a company having no real existence, and was himself held liable for a loss which occurred. *Vann v. Downing*, 48 Phila. Leg. Int. 264, 28 Wkly. Notes Cas. 259.

⁵⁴ 43 Mich. 116, 5 N. W. 72.

C. J., said: "The reasons upon which the doctrine of notice to agent being held notice to principal rests is that the agent is substituted in place of and represents the principal in the particular transaction; and, therefore, while acting in such matters, he takes the place of the principal, and the latter is bound by the agent's act, in the light of the knowledge thus possessed by the agent."

Substantially this rule was held in *Lebanon Sav. Bank v. Hollenbeck*.⁵⁵ The only important modification is the requirement that the knowledge gained before agency shall be remembered and actually present to mind of agent, in order to charge his principal, when acting for the latter in the particular transaction.

This rule has a more prudent limitation in *Mountford v. Scott*.⁵⁶ Sir John Leach there said: "The agent stands in the place of the principal, and notice, therefore, to the agent is notice to the principal; but he cannot stand in the place of the principal until the relation of principal and agent is constituted, and as to all information which he previously acquired the principal is a mere stranger."

The difficulties found in the uniform application of this rule have given rise to several important exceptions. Knowledge acquired previous to agency, in most instances, has been while acting in respect to matters that did not command the most careful attention. Information, therefore, is likely to be inaccurate, and recollections indistinct and nebulous. Recognizing the danger of a too rigid adherence to this theory of agency, Justice Peters, in deciding the case of *Fairfield Sav. Bank v. Chase*, said: "I think the safer and better rule would be that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent, when acting for the principal, so fully that it could not have been at the time forgotten by him. The knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal, and the agent himself must have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it."⁵⁷

⁵⁵ 29 Minn. 322, 13 N. W. 145.

⁵⁶ 3 Madd. 40.

⁵⁷ 72 Me. 226; *Chouteau v. Allen*, 70 Mo. 290; *The Distilled Spirits*, 11 Wall. 367; *Mechem*, Ag. §§ 719-721.

It often occurs that an agent becomes possessed of knowledge which concerns his principal, while acting in confidential relations to other persons, under circumstances where his own interests, personal honor, and the policy of the law forbid disclosure. Knowledge thus gained might charge a person when acting in his own behalf, but, when acting as agent, such knowledge cannot be imputed to his principal. It seems a better theory, and one involving less difficulty in its application, not to regard the agent as "the other self" of the principal, but as one having certain reserved rights that refer to private interests and confidential relations. It is always the duty of the agent to act in good faith to his principal. In doing this, he can withhold no information which he is at liberty to disclose, that is important to protect or promote the interests of his agency. Such disclosures, the law will presume, have been made in respect to knowledge acquired after the agency was created, whether or not while acting within its scope.

Information communicated to the agent at the inception of the insurance, concerning the situation and circumstances of the risk, will in most cases be knowledge imputed to the company, but it will be otherwise in respect to facts brought to the attention of the agent after the insurance begins to run.⁵⁸

⁵⁸ At the time the insurance is negotiated, any facts affecting the risk, communicated to the agent who has the business in hand, will charge the company with knowledge. *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382; *Home Mut. Ins. Co. v. Garfield*, 60 Ill. 124; *Gerhauser v. Insurance Co.*, 7 Nev. 174; *Field v. Insurance Co.*, 6 Biss 121, Fed. Cas. No. 4767; *Russell v. Insurance Co.*, 55 Mo. 585; *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41; *Richards v. Insurance Co.*, 60 Mich. 420, 27 N. W. 586; *Hadley v. Insurance Co.*, 55 N. H. 110; *Andes Ins. Co. v. Shipman*, 77 Ill. 189; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; *Liverpool, London & Globe Ins. Co. v. McGuire*, 52 Miss. 227; *Siltz v. Insurance Co.*, 71 Iowa, 710, 29 N. W. 605; *Graham v. Insurance Co.*, 14 Ont. 358; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570, 19 Atl. 793; *Planters' & Merchants' Ins. Co. v. Thurston*, 93 Ala. 255, 9 South. 268; *Pelzer Manuf'g Co. v. American Fire Ins. Co.*, 36 S. C. 213, 15 S. E. 562.

Knowledge of agent's clerk will create estoppel, but the knowledge must have been received in connection with agent's business. *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 South. 46; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514; *Hartford Fire Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. 685; *Phenix Ins. Co. of Brooklyn v. Covey*, 41 Neb. 724, 60 N. W. 12; *West v. Insurance Soc.*, 10 Utah, 442, 37 Pac. 685.

The insurer will not be charged with knowledge unless the information in possession of its agent at the time of effecting the insurance was so recent, or gained under such circumstances, as to create an inference that the facts learned were distinctly remembered when negotiating the insurance.⁵⁹

When the facts concerning a risk are incorrectly represented to the company by its agent, because of collusion with the insured, the company will not be estopped from denying the truth of such statements. When this occurs there will be present two elementary principles, affecting and changing the application of estoppel as here explained: First, the fraud on the part of the insured in colluding with the agent, from which he can take no benefit; and, second, that the misstatement, while presented to the company by the person of its own agent, is really the act of the insured, one at least for which he will be charged, under application of the rule that a person becomes the agent of him whom he collusively serves.

§ 48. Proof of Agency.

Agency cannot be shown by the declaration of one who claims to act in that relation, nor will evidence of his acts in connection with another's affairs ordinarily be competent to show that he is acting with authority.⁶⁰ If, however, he is continuously and openly performing a service for a corporation, and such service is recognized in the usual course of business transactions, it is competent to show such fact to establish agency in respect to the matter of his customary employment. In the absence of any evidence showing knowledge on the part of the principal, the circumstances must be such as

⁵⁹ The knowledge was acquired by the agent in transacting other business than that of the agency, and so long before the writing of the insurance as to justify no inference that the facts were in mind to influence judgment or action at the time the policy was issued. Held, that insurer was not estopped. *Stennett v. Insurance Co.*, 68 Iowa, 674, 28 N. W. 12.

⁶⁰ Agency may be shown by the declaration of the principal, and by the acts or conduct of either the principal or agent, but never can the testimony of the agent be received to support his claim of agency. *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. Law, 39; *Milligan v. Davis*, 49 Iowa, 126; *Veazie v. Williams*, 8 How. (U. S.) 134; *Foster v. Swasey*, 2 Woodb. & M. (U. S.) 217, Fed. Cas. No. 4,984; *Hatch v. Taylor*, 10 N. H. 538; *Fouch v. Wilson*, 59 Ind. 93; *Matteson v. Blackmer*, 46 Mich. 393, 9 N. W. 445.

to justify an inference that the principal has knowledge, and that the acts of the alleged agent have his authority. If it is known that the principal accepts the benefits of the business transacted, agency will be implied. Agency is a question of fact to be determined by the circumstances and reasonable inferences of the case.⁶¹

§ 49. When Loss Results from Neglect or Misconduct of the Agent, He will be Liable to His Principal.

It is the duty of the agent to execute the orders of his principal in good faith, and with all reasonable diligence, when instructions are given to relieve the company from an objectionable risk by cancellation. Any unnecessary delay in complying with such request will be at the agent's peril. Although the order to cancel may appear unwise to the agent, and as given under a misapprehension of the character and situation of the risk, it will not relieve him from the responsibility of nonperformance.

The duty of an agent is clearly stated in *Courcier v. Ritter*:⁶² "If the order leaves the agent a discretion, the law requires of him nothing further than the exercise of a sound, honest judgment; but if the order be free from ambiguity, is positive and unqualified, it must be rigidly obeyed, if it be practicable, and no motive connected with the interest of the principal, however honestly entertained or however wisely adopted, can excuse a breach of it."

In *Washington Fire & Marine Ins. Co. v. Chesebro*⁶³ the facts stated show that the defendant was the duly-authorized agent of

⁶¹ It is not often that agency can be established by showing the acts of the alleged agent, except there is testimony indicating knowledge of the principal, or such facts as will support a reasonable inference that such knowledge and approval exist. When an agent is acting for a corporation, and has so acted continuously for a long time openly, and his acts have not been publicly repudiated, there will be a strong implication that he is acting with authority. *Reynolds v. Collins*, 78 Ala. 94; *Proctor v. Tows*, 115 Ill. 138, 3 N. E. 569.

"So it can in general be said that the manner in which a party treats one who apparently acts as his agent, and holds him up before third parties, will be a sufficient implication of agency." 1 Am. & Eng. Enc. Law, 340.

⁶² 4 Wash. C. C. 551, Fed. Cas. No. 3,282.

⁶³ 17 Ins. Law J. 58, 35 Fed. 477.

the plaintiff at Putnam, Conn., and had entered into a contract of insurance with the firm of E. T. Whitmore & Co. for \$2,000, although no policy was written. The risk was promptly reported to the company, who immediately wrote defendant: "Please at once relieve us of the risk. The property in itself, and the exposures to the same, would make it prohibited with us. Let us have policy, please, by return mail." This request was not complied with, but defendant replied: "I don't think you have a correct idea of this risk. There are no exposures, and the risk was critically examined a short time since by Special Agent Fowler, of the National of Hartford (who are carrying a line upon it), and approved by him. I am, however, holding the risk subject to your orders, and will return policy (which I have not written) to you if you still desire it." A week later the plaintiff wrote him again as follows: "We must still hold to our original proposition. Please kindly take up and return our policy, friend Chesebro. The defendant replied to this letter, "As I had not written the policy, I return it herewith." The last letter of the plaintiff was written on the 7th of August, but defendant claimed it was not received by him until the morning of the 12th, and that before noon of the same day he returned the policy, without notifying Whitmore & Co. of his action, they being at the time absent from the village, and did not return until evening, and after the property was destroyed. It was in evidence that by ordinary course of mail the last letter written by plaintiff should have been received by defendant within 24 hours after it was mailed. The plaintiff paid the loss, \$1,400, and brought action to recover from the agent on account of his neglect of duty in failing to cancel the insurance as he had been instructed to do. The court (Judge Shipman) instructed the jury as follows:

"It being admitted that the defendant was agent for the plaintiff, it was the duty of the defendant, upon receipt of the notice peremptorily ordering him to cancel the risk, to proceed to do so with all reasonable diligence.

"It being admitted that the office of the agent was within five minutes' walk of the office and place of business of E. T. Whitmore & Co., the insured, the agent's neglect to cancel said policy for a period of more than six days after the receipt of said peremptory order was such a neglect of duty as would render the defendant

liable to the plaintiff for the loss covered by the plaintiff in consequence thereof.

"That the delay, after the receipt of the notice dated July 31st, is not excused by the fact, if it should be found that the agent believed that the company were mistaken as to the safety or danger of the risk, or as to the wisdom of retaining it.

"That if the agent delayed complying with the peremptory orders of the company to cancel the risk, and did so delay from a mistaken view of its safety and wisdom of canceling it, or in the hope of persuading the plaintiff to continue the risk, the delay in the meantime was at his own peril and at his own risk, if a fire should occur.

"If the second order to cancel, dated August 7th, was received by the agent in such season that he had one or two days before the day of the fire in which to cancel, and he made no attempt to do so, such neglect on the part of the defendant was a breach of his duty, and would render him liable for the damages which the company suffered in consequence thereof."

On a very diligent examination of the authorities, we do not find that the excellent and concise statement of law made in this case by Judge Shipman is anywhere controverted. This statement expresses with terse lucidity the duty of the agent to execute with reasonable dispatch the commands of his principal, and, when no discretion is given, performance must be literal, and without regard to his own judgment of the manner in which the principal's interest will be affected. It proclaims the right of the principal to direct and the duty of the agent to obey.

The supreme court of Minnesota, in the case of *Hanover Fire Ins. Co. v. Ames*,⁶⁴ has considered and applied this same principle of the agent's liability under circumstances where the question is somewhat more involved. Judge Ames was the plaintiff's local agent at Minneapolis, and Mr. W. E. Page a special or state agent, with full authority in regard to the supervision of the plaintiff's business in Minnesota. On block 62 of Minneapolis was a large building, known as the "Warner Block." One of the occupants of this building held a policy issued by the plaintiff, through the defendant as agent. The policy was entered on the office register furnished by plaintiff for the

⁶⁴ 39 Minn. 150, 39 N. W. 300.

use of its agent in preserving a record of the company's business. Mr. Page, in the performance of his supervisory duties, entered, in the absence of defendant, on this office register, opposite the risk before referred to, a memorandum of his instructions to discontinue the insurance when the policy should expire, and to accept no more risks in that block. To these instructions Mr. Page called the attention of one of the clerks in charge of the defendant's office. Subsequently, in disregard of these instructions, though it appears under a misapprehension of their import, defendant did issue a policy covering on a stock of goods owned by another person located in the same building, and a loss occurring, for which the plaintiff became liable, suit was brought to recover from the defendant the amount paid. The court, after reviewing the facts as above, said: "The instructions were authoritatively entered on the 'Block Book,' according to the usual course of business well known to the defendant, and made for the definite purpose of regulating the conduct of the defendant in placing risks. They could not, therefore, be safely disregarded."

§ 50. Liability of Agent When Disobeying Instructions.*

When the agent accepts a risk from a broker, and afterwards receives from his principal, the company that issues the policy, instructions to cancel, it will not be sufficient for him to notify the broker, and request him to act in the matter of terminating the insurance. The broker, as we have heretofore seen, has no responsibility in connection with the insurance contract after it has been delivered and the premium collected. Prior to that time he has been held, generally, to have been the agent of the insured, but with the completion and delivery of the contract his duties are ended, and notice to him of cancellation will not be notice to the assured. When, therefore, the agent undertakes, through the instrumentality of the broker, to effect a cancellation, he assumes all the responsibility of failure. The broker becomes his agent for this purpose, and should a loss occur, for which the company is held on account of the broker's neglect to act with reasonable diligence, the agent of the insurer, who is primarily charged with the duty of terminating the risk, will be liable to his principal.

* See sections 38 and 40.

This was held in *Franklin Ins. Co. v. Sears*.⁶⁵ On May 22, 1882, the defendant, as the agent of plaintiff at Cincinnati, issued a policy to the Central Oil Company, the risk having been brought to him by a broker. On the 25th of the same month the transaction was reported by letter to the plaintiff in Boston. On the 29th the report was received, and plaintiff immediately notified defendant, by mail, to cancel. This instruction was received by the agent about the 1st or 2d of June, and on the same day defendant notified the broker from whom he obtained the risk, and requested him to cancel the policy. This the broker promised to do, and, in pursuance with this engagement, it was shown that he called at the office of the Central Oil Company, but finding that one of the proprietors, and the particular person he desired to see, was absent from the city, and would be gone for several days, decided to defer further effort in regard to canceling the insurance until his return; and thus the matter rested until the morning of the 7th of June, when the agent, becoming uneasy because of the delay, sought the broker, and together the two proceeded to the office of the Central Oil Company, and then found that the property insured by the policy was in flames. Plaintiff settled the loss, and brought action against the agent for the amount paid. The court said: "The defendant was plaintiff's agent. It was his duty to obey the order to cancel the policy. That was an obligation of his contract of agency. The broker was the agent of the assured. He was not the agent of the plaintiff. It is true that his agency for the assured terminated with the placing of the insurance, but all his interest in the matter was with the assured. * * * To hold that the agent of the insurance company, under instructions to cancel the policy, discharges his duty, and frees himself from the responsibility, by notifying the broker according to custom, and leaving the matter entirely in his hands, would be in direct conflict with the principle of the ruling in *Grace v. American Cent. Ins. Co.*,⁶⁶ that it is not competent to prove a custom that notice to the broker should operate to cancel a policy. * * * When the agent was directed to cancel the policy, it became his duty to pursue the method pointed out in the policy, and to do so promptly. He might do this personally, or through the broker who placed the insurance. If he

⁶⁵ 21 Fed. 290, 13 Ins. Law J. 768.⁶⁶ 109 U. S. 278, 3 Sup. Ct. 207.

chose to act through the broker, he made the latter his agent, and was responsible for such default, as was clearly proven by the undisputed evidence upon the trial. * * * The delay was unreasonable, and, giving to the testimony its greatest probative force in favor of the defendant, it was without sufficient excuse; and the court might, therefore, properly have directed a verdict for the plaintiff."

The defendant urged with great persistence the existence of a custom that when a risk was received from a broker the cancellation was effected through his instrumentality, and that in this case, the agent having notified the broker to cancel the policy, and, subsequently finding that it had not been done, urging him again to do so, he had performed his full duty in the matter, and should not be charged with the loss his principal had sustained. The court declined, and we think correctly, to relieve the defendant from the responsibility of neglecting to carry out the instructions of his principal on account of this alleged custom.⁶⁷

Where a risk is of a class that a company is accustomed to write, but which it has accepted at a lower rate of premium than should have been paid, having been misled as to its true character by the representations of the agent, the measure of the agent's liability, on the destruction of the property by fire, is not the sum which the insurer will be required to pay claimant in settlement of the loss, but such sum as expresses the difference between the premium actually paid, and such premium as might fairly have been demanded on a correct representation of the hazard.⁶⁸

When a company pays a loss on a risk which had not been reported at the occurrence of the fire, the agent having been negligent in the matter, it is competent to show, as affecting the agent's liability, that, in pursuing the usual course of inspection and criticism, the risk would have been promptly declined, had the company been informed in accordance with instructions given to agent.⁶⁹

⁶⁷ It will not excuse an agent for failing to cancel a risk when he has been instructed to do so, because there may be a local custom in such cases to notify the broker from whom the risk was received, and await his action. *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. R. 21; *Kraber v. Insurance Co.*, 129 Pa. St. 8, 18 Atl. 491.

⁶⁸ *State Ins. Co. v. Richmond*, 71 Iowa, 519, 32 N. W. 496.

⁶⁹ Agent was negligent in sending in his report of risk, and a loss occurred

§ 51. The Local Agent must Obey Instructions of the General or Special Agent.

In conducting the insurance business, a class of agents is employed whose duties relate principally to the adjustment of losses, appointing local agents, collecting balances from those who are delinquent, inspecting risks, and performing such other duties in connection with the agency system as will secure the greatest efficiency and promote the best interests of the company by which they are employed. Persons thus engaged are sometimes designated as adjusters, but more frequently as special or state agents. They are recognized as having general powers in the territory to which they are appointed. They receive the confidential orders of the general office, and are the direct and authorized representatives of the company. Their communications to local agents are entitled to the same confidence and respect as though they were received directly from the president or secretary of the company.

The duty of the local agent to submit to the authority of a special or state agent was pointed out by the supreme court of Minnesota in the case of *Phoenix Ins. Co. v. Pratt*.⁷⁰ The facts show in this case that Mr. Otto E. Greely was the special agent of the plaintiff for Minnesota, and that the defendants had been duly notified of his appointment. While Mr. Greely's duties had not been particularly defined in any communication from the company to its agents in Minnesota, nor had the defendants ever been notified as to the extent of his authority, it was shown by the evidence produced in the trial of the case that Mr. Greely was generally known and recognized among insurance agents of that state as being fully authorized by the plaintiff to adjust losses and supervise its business, which included the inspection and criticism of risks taken by local agents,

before the company had opportunity to examine and consider the hazard. Having paid the loss, the company brought suit to recover of the agent. Held, that it was competent for plaintiff to offer testimony tending to show that if the agent had notified it of the risk at the proper time, in accordance with his instructions to do so, it would have canceled and thereby relieved itself of the risk before the fire. *State Ins. Co. v. Jamison*, 79 Iowa, 245, 44 N. W. 371.

⁷⁰ 36 Minn. 409, 31 N. W. 454, 16 Ins. Law J. 301.

and, further, that his authority extended to requiring the agent to cancel such risks as his judgment did not approve. The defendants had, as agents of the plaintiff, issued its policy, in behalf of the First National Bank of Anoka, covering upon the Anoka City Mills. On the 28th of February, 1885, Mr. Greely wrote the defendants in reference to cancellation of this policy. The letter itself was not produced in evidence. The defendants claimed that it read substantially as follows: "I wish you would relieve us of the risk as soon as possible." Mr. Greely testified that it expressed an absolute and positive order to cancel. Defendants replied, March 1st, reminding Mr. Greely that the policy would expire on the 19th of April, and expressing their reluctance to cancel, adding that it would be an accommodation to them if he would allow the risk to continue to expiration. When this letter reached Minneapolis, where Mr. Greely resided, he was absent from the city, and the letter did not come to his attention until after the property was burned, which occurred March 4th. The loss was adjusted and paid by the plaintiff, who thereupon demanded to be reimbursed by the defendants, which demand being refused, suit was brought. The court held that "the fire took place four days after the receipt of the letter by the defendants, and no good reason appears why they might not have canceled the policy within that time, if they had been disposed to; and if, under the circumstances, the letter of Greely ought to be construed as an instruction by an authorized superior agent to cancel the policy, the defendants are liable. They were bound to exercise good faith and reasonable diligence in discharging the duties which they owed to their principal, and to make good any loss or damage arising from any negligent omission on their part in departing from the instructions of their superior, in the management of the company's business intrusted to them." *Franklin Ins. Co. v. Sears*.⁷¹

§ 52. When Agent is Liable to the Insured.

The agent may be liable to the insured when, by misrepresentation, he misleads him to his injury, as claiming to have authority in

⁷¹ 21 Fed. 290; *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513, 8 N. E. 348.

particular relations which he does not possess, or in representing a company to be safe, and abundantly able to pay its losses, as an inducement to take a policy, when he well knows it to be insolvent. Where an agent assumes to act beyond the limitations of his authority, and thus undertakes to bind his principal by contract, which the principal may and does repudiate, the agent will be personally liable to the party sustaining injury.

This was held in *Kroeger v. Pitcairn*.⁷² Pitcairn was the agent of the Birmingham Insurance Company, and issued a policy to Kroeger, who soon after discovered that it contained a condition making it void if petroleum oil, or its products, were kept on the premises. K. sought P., and explained to him that it was important that he should be permitted to keep a small quantity of this kind of oil in stock. P. assured K. that the condition of the policy was intended to prohibit petroleum oil being kept in large quantities only; that, if not more than a barrel was required to be kept in stock at any one time, he need feel no concern, as the policy would not be voided. On this assurance K. rested, and, a fire subsequently occurring, the policy was held to be void on account of the inhibition. K. then proceeded in an action against P., which was sustained. The court held that, "P. having given positive assurance in excess of his authority, he was liable. The fact that he might have been guilty of no intended fraud or moral turpitude did not exempt him from liability."⁷³ The rule is otherwise when the promise to perform is not

⁷² 101 Pa. St. 311.

⁷³ When, for a consideration, an agent contracts in reference to any particular matter, and in doing so fails to bind his principal, he will be personally charged with performance, as when he is agent for several companies, and contracts to insure property particularly described, without disclosing the name of the company with which he intends to place the risk, and the fire occurring without any company being bound, the agent will be liable for the loss.

In *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726, the defendant, who was an insurance agent, received from plaintiff \$5 in money, for which he agreed to procure an insurance of \$250 on a certain dwelling house, which was afterwards burned. While defendant was agent for several companies, he had in no way indicated which one should assume the hazard. As, therefore, through the fault of the agent no company had been charged with the loss, the court held that the agent must pay it. Fuller, J., said: "Where an agent, failing to disclose his principal, enters into a contract of such a char-

supported by a consideration. Unless a gratuitous service is required by law, no damages can be enforced for neglect or failure.

acter, and in such a manner, that it can be made effectual only by making the agent liable for a breach thereof, such agent will be personally bound, unless a different intention clearly appears from the terms of such contract. * * * The money was paid, and the arrangements were consummated by which the insurance was to be procured, without any intimation as to the company in which the same was to be placed; and we are disposed to regard the relation existing between appellant and respondent as that of principal and agent, and to hold that an agent who takes his principal's money, under an express agreement to procure insurance, and unjustifiably fails to secure the same, or make an effort in that direction, thereby assumes the risk, and becomes liable, in case of loss, to pay as much of the same as would have been covered by the insurance policy for which his principal had paid." *Mechem*, Ag. 475; 3 *Suth. Dam.* 9; *Perkins v. Insurance Co.*, 4 *Cow.* 645; *Thorne v. Deas*, 4 *Johns.* 84; *Shoenfeld v. Fleisher*, 73 *Ill.* 404; *Beardsley v. Davis*, 52 *Barb.* 159; *Gray v. Murray*, 3 *Johns. Ch.* 169; *Morris v. Summerl*, 2 *Wash. C. C.* 203, *Fed. Cas.* No. 9,837.

In *Thorne v. Deas*, *supra*, *Kent, C. J.*, said: "The chief objection raised to the right of recovery in this case is the want of consideration for the promise. The offer on the part of the defendant to cause insurance to be effected was perfectly voluntary. Will, then, an action lie when one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance; but the defendant never entered upon the execution of his undertaking, and the action is brought for nonfeasance. * * * A short review of the leading cases will show that by common law a mandatory, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss; in other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages are averred."

This rule of law was recognized by the Wisconsin court in *Stadler v. Trever*, 86 *Wis.* 42, 56 *N. W.* 187. The defendant there had the agency of several insurance companies, in one of which he had written a policy for plaintiff in the sum of \$300. The property covered was removed afterwards to a different locality, and the policy given to the agent for the purpose of having the transfer properly indorsed. The agent subsequently informed plaintiff that he had canceled the policy, but that he would procure insurance in another company for the same amount, and this arrangement was agreed to by plaintiff. This promise defendant failed to keep, and the property afterwards burned. *Lyon, C. J.*, who wrote the opinion,

So, too, in *Hurrell v. Bullard*,⁷⁴ where an agent, whose duty it was to insure certain property, neglected to use proper diligence to ascertain the solvency of the company in which the risk was placed, and, the latter being unable to pay a loss which occurred, it was held that the agent was liable, the same as though he had assumed the risk himself.

When the adjusting agent, by duress, fraud, or misrepresentation, induces a claimant for loss to accept in payment a less sum than he is entitled to receive, the person thus wronged may return, or offer to return, the money received in consideration of such settlement, and then bring suit against the insurer on the original obligation, or he may sue the adjusting agent for the damage he has sustained under the terms of the compromise settlement.

This remedy was distinctly affirmed in *Home Ins. Co. v. Howard*.⁷⁵ The court said: "A person so circumstanced may retain what he has received, and sue whoever is liable for the consequences of the deceit by which the compromise was brought about, and recover whatever damage resulted therefrom."

When the adjusting agent, in settlement of a loss, gives his draft on the company, if payment is refused the agent will be liable. No person is liable as a party to a bill, whose signature is not on it.⁷⁶

§ 53. Knowledge of the Agent.

Knowledge of the agent, whether his powers be limited or general, in regard to facts existing at the beginning of the insurance, and whether or not expressed in the application, will create estoppel;

after pointing out that plaintiff had not shown any consideration for the promise, said in regard to defendant: "Presumably, he had paid over the premium on the original policy to the insurance company entitled thereto. In that case he had no funds in his hands with which to pay the premium on the new policy; and his agreement to write a new policy, if he so agreed, was without consideration, and not binding upon him." This same rule of law is stated by text writers. See *Mechem*, Ag. § 478.

⁷⁴ 3 Fost. & F. 445.

⁷⁵ 111 Ind. 544, 13 N. E. 103, and 17 Ins. Law J. 65.

⁷⁶ *Benj. Bills*, p. 77; *Arnold v. Sprague*, 34 Vt. 409; *Williams v. Robbins*, 16 Gray (Mass.) 77; *Collins v. Insurance Co.*, 17 Ohio St. 215; *Powers v. Briggs*, 79 Ill. 493.

but agreements made in respect to subsequent changes and conditions will be nugatory, when repugnant to the terms of the policy. A policy delivered by the insurer, and accepted by the insured, contained a provision that, if the property covered should cease to be occupied, consent of the company must be obtained, in writing; otherwise the insurance would be forfeited. The agent, at the time the risk was taken, informed the insured that a subsequent vacancy would not cause an avoidance. A loss having afterwards occurred, and payment been refused for the reason that the property was not occupied, it was held that the insurer was discharged. It will always be presumed that, when the negotiations have ended in the written contract, the parol agreements in reference to matters of future performance are all merged and expressed in the writing which is tendered by one party, and accepted by the other, as the consummation of their wishes and intention.⁷⁷

§ 54. Limitation of Soliciting Agent's Authority in Certain Cases.

The broker is agent of the assured in most cases, while the solicitor is always the agent of the company. The former is usually employed by the party seeking insurance; and the latter, by the insurer. The duties of each terminate when the policy is delivered. Neither will afterwards have any authority in respect to the matter. Notice of cancellation given to the broker will not be sufficient, as we have heretofore shown, nor will notice of loss given to the solicitor be notice to the company; but when the solicitor re-

⁷⁷ *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Havens v. Insurance Co.*, 111 Ind. 94, 95, 12 N. E. 137; *Maril v. Insurance Co.*, 95 Ga. 604, 23 S. E. 463; *Laclede Fire-Brick Manuf'g Co. v. Hartford Steam-Boiler Inspection & Ins. Co.*, 9 C. C. A. 1, 60 Fed. 351; *Dryer v. Insurance Co. (Iowa)* 62 N. W. 798; *Bennett v. Insurance Co.*, 55 N. J. Law, 377, 27 Atl. 641; *Thomson v. Insurance Co. (Ga.)* 15 S. E. 652; *Baumgartel v. Insurance Co.*, 136 N. Y. 547, 32 N. E. 990; *Wilcox v. Insurance Co.*, 85 Wis. 193, 55 N. W. 188; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Dover Glass-Works Co. v. American Fire Ins. Co. (Del. Err. & App.)* 29 Atl. 1039; *Edwards v. Insurance Co.*, 88 Wis. 450, 60 N. W. 782; *Platt v. Insurance Co.*, 153 Ill. 113, 38 N. E., on page 583; *Syndicate Ins. Co. v. Bohn*, 12 C. C. A. 531, 65 Fed. 165.

ceives notice of loss, and forwards the same to the company, it will suffice. The solicitor not having the power to make the contract, it is unnecessary to say that he has no power to change it. He cannot, by waiver or otherwise, alter or modify its conditions. If a note is given for the premium, he has no authority to waive default, or extend the time of payment. And this will be true even though charged with the collection of the premium.⁷⁸

⁷⁸ In *Morse v. Insurance Co.*, 5 Ins. Law J. 409, it was held: An agent authorized to solicit applications, to be forwarded for approval to the company, and to collect and transmit premiums, is not authorized to bind the company by verbal contract to insure. The fact that the insured, on a prior application, had been told by the agent that he was insured from that time, and the policy so insuring him was subsequently issued, did not justify the insured in believing that the agent had power to bind the company. Gilfillan, C. J., said: "The defendant denies the contract, and the authority of the agent to make it. As to the agent making the contract, there was not sufficient evidence to justify the finding. We do not think there was evidence as to his authority to make such a contract. As between him and the company, his authority was that of a soliciting agent, authorized to receive applications for insurance in accordance with instructions to agents, and to collect and transmit the premiums therefor, and the applications were to be forwarded to the company for its approval or rejection. This alone would not authorize the agent to make a contract."

In *Critchett v. Insurance Co.*, 53 Iowa, 404, 5 N. W. 543, and 9 Ins. Law J. 594, it was held: "An insurance agent, authorized to collect and transmit premiums, but with no expressed authority to bind the company by contract, cannot, by agreement with the assured, bind the company to any postponement of the payment of the premium note, and thereby keep the policy in force in contravention of its provisions." Adams, C. J., said: "The plaintiff claims that he was not in default at the time of the loss, notwithstanding the nonpayment of the installment which, by the terms of his note, fell due on the 1st day of November, 1876. He claims that the company had extended the time of payment. As evidence of such extension, he testified that one Kennedy, the agent of the company at Oskaloosa, near where he resided, agreed with him, after the installment became due, to extend the time of payment until he (plaintiff) should receive a certain pension; that he received his pension March 8, 1877, and on the same day went to Kennedy's office to pay the installment due on the insurance note, but did not find him, and the next day, about 4 o'clock in the afternoon, the property insured was destroyed by fire. The defendant denies that any agreement for extension was made between the plaintiff and Kennedy, and introduced Kennedy as a witness, who testified that none was made. Upon this point the jury found against the defendant, and, the evidence being conflicting, their finding must be taken as conclusive. But the defendant insists that, conceding that Kennedy agreed to an extension, the

The authorities sustain, with great uniformity, the rule that the soliciting agent, acting within the scope of his real or apparent authority, may bind his principal as effectually as he could do in respect to the same matters if his powers were unrestricted. It may be competent, however, for an insurance company, under certain circumstances, to withhold from the soliciting agent any authority whatever to bind it. This the insurer has sometimes attempted to do by incorporating into its policy a provision that any person, other than the assured, who shall procure the insurance to be written, shall be deemed to be the agent of the insured, and not of the company. The courts have not generally regarded with favor this obvious purpose on the part of the insurance company to escape from the responsibility of the mistakes and misconduct of persons whom it has appointed to the performance of these duties. Agency will generally be determined by facts and circumstances, independent of contract stipulations. Calling the agent of Brown the agent of Smith does not, in any important sense, change the relations actually existing between the parties, or, as a distinguished New York judge expressed it, "calling snow hot does not make it even warm." If the applicant for insurance has knowledge that the solicitor has no power to bind the company by anything he may do, he will then deal with him at his peril. But, in the absence of any notice that the solicitor is acting without authority, he may be warranted in inferring agency from such facts as the solicitor

defendant would not be bound by it, because Kennedy had no authority to bind the company in that respect. * * * Kennedy's authority was shown by the certificate of his appointment, introduced in evidence, from which it appears that he was authorized to receive applications for insurance, and collect and transmit premiums. Kennedy testified that he was not authorized to issue policies, and it is not pretended that he was. The court instructed the jury, in substance, that the plaintiff would be entitled to recover if they found that Kennedy agreed to extend the time of payment, and that the loss occurred within such time. The giving of this instruction is assigned as error. * * * An agent employed to collect a claim does not thereby have authority to bind the principal, even to grant an extension of time. *Hutchings v. Munger*, 41 N. Y. 155; *Kirk v. Hiatt*, 2 Cart. (Ind.) 322; *Corning v. Strong*, 1 Cart. (Ind.) 329. Still less would such agent have authority to bind the principal by a contract of insurance. We have seen no case where the doctrine contended for by the plaintiff has been held."

having in his possession blanks and other agency outfit belonging to the company; and the solicitor having taken applications for other persons, on other occasions, which have been approved by the company and the policies returned, such facts would evidence an apparent authority that would justify a reasonable inference of agency, notwithstanding the solicitor may have received from the company secret instructions prohibiting him from acting in any matter as its agent. The stipulation expressed in the policy before referred to would not be notice to the applicant that the solicitor was not the agent of the company, as the policy would not come into his hands until his dealings with the solicitor had ended. There is a class of cases which sustains the doctrine that a forfeiture will not be saved on account of the solicitor's knowledge of facts which, if undisclosed to him, under the terms of the policy, would cause an avoidance.⁷⁹

⁷⁹ In *Wilson v. Insurance Co.*, 4 R. I. 141, the agent had been appointed only to receive applications and forward them to the company. Authority alone was reposed in the directors to approve of the risks. They had the decision whether the company would enter into the proposed contract, and upon what terms. Of this fact the applicant had notice. It was held that a policy issued upon an application taken by an agent, and transmitted to the directors, could not be affected by facts not stated in the application, though known by the agent, because he was not the agent for the purpose of receiving such notice.

So, too, in *Mitchell v. Insurance Co.*, 51 Pa. St. 402, the solicitor had the usual powers of that class of agents. He was authorized to make surveys of property to be insured, take applications, and collect assessments. A policy issued on one of the applications taken by him contained a clause prohibiting insurance to exceed two-thirds the value of the property insured. It was held that notice to him that insurance had been made, exceeding the limit, was not notice to the company. See *Vose v. Insurance Co.*, 6 Cush. (Mass.) 42.

An agent having authority only to take applications and collect premiums cannot bind the company to issue a policy. What he does is only in the way of submitting proposals, which the company may decline if its judgment of the risk does not approve. *Chase v. Insurance Co.*, 22 Barb. (N. Y.) 527. Neither can he prescribe the terms of the policy, or waive any of its special inhibitory provisions in regard to keeping on the premises gunpowder or other explosive substances. *Bartholomew v. Insurance Co.*, 25 Iowa, 507; *Healey v. Insurance Co.*, 5 Nev. 268.

In the last case cited there was an attempt on the part of the solicitor,

§ 55. Agents will Bind Their Principals When Acting within the Apparent Scope of Their Authority.

The agent will bind his principal when acting within the scope of his apparent authority, but no further. One who is held out as having powers to make contracts of insurance will be presumed to have authority to perform all things preliminary and incident thereto, such as fixing its terms, collecting the premium, waiving conditions in regard to defects in title, consenting to incumbrances, other insurance, etc.; but the fact that an agent has power to make contracts raises no implication of authority to adjust losses or waive proofs. His agency will not be extended to any other matters than those where it is shown that he has been accustomed to act with the approval of his principal. A person who appoints an agent to build a house according to certain plans and specifications, and publishes such agency to the world, withholding, however, the spe-

after the arrival of the policy, to waive the condition requiring notice of other insurance. The court held that he had no authority in respect to the matter at that time.

It was held also in *Winnesheik Ins. Co. v. Holzgrafe*, 46 Ill. 422: "An agent having only authority to receive applications, collect premiums, and who was never held out to possess other powers, cannot make a contract of insurance or bind the company by representing that the policy will take effect from the date of the application." *Dickinson Co. v. Mississippi Val. Ins. Co.*, 41 Iowa, 286; *Stockton v. Insurance Co.*, 33 La. Ann. 577; *Todd v. Insurance Co.*, 34 La. Ann. 63; *Liverpool & L. & G. Ins. Co. v. Van Os*, 63 Miss. 431; *Devens v. Insurance Co.*, 83 N. Y. 168.

It was held in *Hambleton v. Insurance Co.*, 6 Biss. 91, Fed. Cas. No. 5,972, "that a person employed as a clerk or agent to solicit insurance and renewal of policies, without any authority except such as might arise from the nature of his employment, is not authorized to waive the payment on a contract for insurance." See, also, *Waldman v. Insurance Co.*, 91 Ala. 170, 8 South. 666.

After the policy has been delivered, a notice to the soliciting agent of an increase of the risk, or of any other fact under the conditions of the policy, where notice is required, will not be sufficient to relieve a forfeiture. *Crane v. Insurance Co.*, 2 Flip. 576, 3 Fed. 558; *Heath v. Insurance Co.*, 58 N. H. 414; *Security Ins. Co. of New York v. Fay*, 22 Mich. 467, 1 Ins. Law J. 203; *Barre v. Insurance Co.*, 76 Iowa, 609, 41 N. W. 373.

In the last case cited it was held, in a suit upon a contract to issue a policy of insurance, that there can be no recovery for a loss unless the con-

cial agreements and restrictions in regard to the particular manner in which the house should be constructed, cannot escape liability should mechanics and merchants contract with such agent within the "apparent" scope of his authority to supply labor and material; but when the house is completed, should the agent offer to sell, buyers would then be put upon inquiry, and undoubtedly deal with him in that relation at their peril. So, too, the courts have always made a sharp distinction between agents who are authorized to insure, and those who have authority to adjust claims for loss.

When no special limitations are imposed, of which the insured has notice, the authority of the agent may be inferred from the latitude of his accustomed employment. The relations in which the agent assumes to act, with the knowledge of his principal, will usually indicate the scope of his authority, and a reasonable limit within which his acts and promises may be relied upon to bind his company.⁸⁰

ditions as to notice and statement of loss contained in the policies, of the form usually issued by the defendant, are complied with or waived, and that, to establish a waiver of the acts of its soliciting agent or adjuster, his authority to make a waiver must be proved. Beck, J., in his discussion of the case, said: "But counsel for plaintiff insisted that the district court erred in failing to submit to the jury the question whether defendant had waived the failure to comply with the terms of the policy as to the notice and statement of the particulars of the loss. We think the evidence wholly fails to show the waiver relied upon. A waiver can only be made by one having sufficient authority to make it, and such authority must be shown. The acts claimed to be a waiver were done either by the agent who took the application for the insurance and made the contract sued on, or by an adjuster; but it is not shown, or attempted to be, that either of these persons had authority to make the waiver. The duties with which it is shown, or will be inferred, they were clothed, do not pertain to waivers of this character. Indeed, there is no evidence tending to establish the authority of these persons to make the waiver." *Hollis v. Insurance Co.*, 65 Iowa, 454, 21 N. W. 774; *Putnam Tool Co. v. Fitchburg Mut. Fire Ins. Co.*, 145 Mass. 265, 13 N. E. 902.

⁸⁰ In *Blackwell v. Ketcham*, 53 Ind. 184, the agent was authorized to sign his principal's name to a note for a sum stated. But, exceeding his authority, he made a note for a larger sum, and the principal was not held for payment.

So, an authority given to sell property does not authorize the agent to put a mortgage on it. This was held in *Switzer v. Wilvers*, 24 Kan. 384.

An insurance broker was authorized by his principal to procure insurance in

§ 56. Persons Dealing with Agents are Put upon Inquiry as to the Extent of Their Authority.

It has been held often that those who deal with a special agent (that is, where the circumstances of his employment indicate limited

a sum designated, and he did so for a larger sum. It was held that the contract was indivisible, and the policy void. *Baines v. Ewing*, 4 Hurl. & C. 511.

Where an agent also was authorized to draw a bill due in four months, and drew one payable in less time, but antedated it, making it apparently drawn according to his authority, the principal was held not liable. *Smith v. Stephenson*, 45 Iowa, 645.

In *Tate v. Evans*, 7 Mo. 419, it was held that the principal is bound by the acts of the general agent, providing they are within the scope of his authority, but that an agent appointed for a special purpose, and acting under such limited powers, cannot bind his principal by an act in excess of such authority.

In *Batty v. Carswell*, 2 Johns. 48, authority was limited to a single act, to be performed in a specified manner. The agent was empowered to make a note for \$250, due in 6 months, but the note given by the agent was payable in 60 days. It was held that the principal was not bound.

The following is the rule stated in *Hill v. Helton*, 80 Ala. 528, 1 South. 340: "Notice to an agent is notice to the principal only when it is acquired while engaged in the business of the principal, within the scope of his authority, and respecting a transaction then depending."

So, also, in *Wood, Ins.* (1st Ed.) p. 640: "Where a limitation is imposed upon the power of the agent upon the face of the policy, of which the assured, as a prudent man, ought to know, and there is no evidence that the agent has been accustomed to act in excess of such power within the expressed or implied assent of the insurer, the assured is not justified in dealing with him in reference to such matters, and his acts as to the excess of authority are not binding upon the company."

Justice Allen, in considering a New York case in reference to the question here being considered, said: "In the face of a distinct, written expression in the policy of a want of power in an agent, the party suing to recover upon such policy has no right to infer the subsequent existence of such power by any uncertain sign. There must be evidence to justify the belief that the company, by direct authority, enlarged the powers of the agent, or that they knowingly permitted him to act for them beyond the scope of the powers originally conferred." *Merserau v. Insurance Co.*, 66 N. Y. 279.

See, also, 1 Pars. Cont. p. 61: "If the power of an agent be given by a written instrument, which is known to the party contracting with him, such instrument must be followed strictly; and the power given by it cannot be varied or enlarged by evidence of usage, because the effect of usage is properly limited

powers) are bound, at their peril, to know the extent of his authority, and that, before the declaration of an agent can bind the principal,

to the manner in which the power is to be exercised, and even in this respect it cannot control the language of the instrument, although it may in construing its words, or in supplying some others needed."

It was held in *Cooley v. Willard*, 34 Ill. 69, that "the exception to extending the principal's liability in favor of the third parties is only where such third parties are ignorant that restrictions have been imposed upon the agent."

In *Whitehead v. Tuckett*, 15 East, 400, it was said: "If, considering the agency in the latter aspect, the domestic contract between principal and agent could be excluded from the mind, and reserved for separate observation, it might evidently be laid down as a rule of law that the principal is in all cases bound by the acts of the agent done within the scope of his authority, and never except for these."

The right of an insurance company to limit the powers of its agents, and bind the insured by notice contained in the policy, was distinctly affirmed in *Walsh v. Insurance Co.*, 73 N. Y. 5, 7 Ins. Law J. 423. There was incorporated in the Hartford policy a provision that the agent had no authority to waive any of its conditions, except by specific agreements indorsed thereon in writing. It was also provided that if the property insured should become vacant or unoccupied, without the written consent of the company indorsed on the policy, it should be void. The building insured subsequently did become unoccupied, and notice of the fact was given to the agent, who gave his oral consent, and made indorsement on his office register. The New York court of appeals held that the company was not liable. It said: "This is a plain limitation upon the power of the agent, and can mean nothing else than that the agent shall not have power to waive the conditions, except in one mode, namely, by indorsement on the policy. If a person dealing with an agent knows that he is acting under circumscribed and limited authority, and that his action is in excess of the authority actually conferred, then manifestly the principal is not bound, and it is immaterial whether the agent is a general or special one. The principal has an unqualified right, as between himself and the agent, to define and limit the agent's authority,—to invest him with full or restricted powers only."

The same ruling has been made in a large number of cases, among which are *Gladding v. Association*, 66 Cal. 6, 4 Pac. 764, and 13 Ins. Law J. 893; *Merserau v. Insurance Co.*, 66 N. Y. 274; *Marvin v. Insurance Co.*, 85 N. Y. 278; *O'Reilly v. Assurance Corp.*, 101 N. Y. 575, 5 N. E. 568; *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518; *McIntyre v. Insurance Co.*, 52 Mich. 188, 17 N. W. 781; *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660; *Bowlin v. Insurance Co.*, 36 Minn. 433, 31 N. W. 859; *Shuggart v. Insurance Co.*, 55 Cal. 408; *Enos v. Insurance Co.*, 67 Cal. 621, 8 Pac. 379; *Leonard v. Insurance Co.*, 97 Ind. 299; *Winneshiek Ins. Co. v. Halzgrafe*, 53 Ill. 516; *Universal Mut. Fire Ins. Co. v. Weiss*, 106 Pa. St. 20; *Pottsville Mut. Fire*

it must be shown that such declaration was made in and about a matter over which the agent had authority from the principal to

Ins. Co. v. Minnequa Springs Imp. Co., 100 Pa. St. 137; *Clevenger v. Insurance Co.*, 2 Dak. 114, 3 N. W. 313.

But, unless there is a provision in the policy limiting the powers of the agent, he may alter, modify, or even waive altogether, its conditions. *Schomer v. Insurance Co.*, 50 Wis. 575, 7 N. W. 544; *Silverberg v. Insurance Co.*, 67 Cal. 36, 7 Pac. 38; *Alexander v. Insurance Co.*, 67 Wis. 422, 30 N. W. 727.

The case of *Hankins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34, is one of so much interest in several important particulars that we quote it entire. At the time the policy was issued, June 10, 1885, there was a mortgage on the property, held by Mrs. Emma Pease, and the policy was indorsed, "loss, if any, payable" to her. This mortgage was paid the 14th of July, following; and on the 24th of March, 1886, another incumbrance was placed on the property, amounting to \$62.50. The policy contained a clause to the effect that if the property thereby insured should subsequently become mortgaged, or in any manner incumbered "without the consent of the secretary in writing," then in such case the policy should be void. Besides this, there was another condition of the policy, as follows: "It is expressly provided that no officer, agent, or employé, or any person or persons except the secretary, in writing, can in any manner waive either or any of the conditions of this policy, which is made and accepted upon the above conditions." It was in evidence that the agent who wrote the policy was notified of the last mortgage, on account of which a forfeiture was claimed, and agreed orally that it should not cause an avoidance of the policy. Cassoday, J., said: "The mere fact that the mortgage to Pease, mentioned in the policy, had been paid and discharged, did not authorize the plaintiff to place another mortgage, running to a different party, upon the premises insured, in violation of the conditions of the policy above mentioned. Such conditions in policies 'are to secure risks in which there shall be no motive for intentional or dishonest loss.' *Redmon v. Insurance Co.*, 51 Wis. 301, 8 N. W. 226. True, the mortgage here is small; but to hold that the plaintiff had the right to put it upon the premises in contravention of the agreement, without jeopardizing the risk, would be to establish a rule which would authorize a large mortgage with the same impunity. The question was submitted to the jury whether the plaintiff procured the consent of the local agent to the placing of that mortgage upon the premises, with the instruction that if he did it 'would be a waiver of the company of this special clause in the policy.' The jury necessarily found that the plaintiff did procure such consent, and hence that there was such waiver. It is urged that a local agent for an insurance company is an agent for such company for all purposes, under section 1977, Rev. St. Expressions may be found, when not limited by the facts of the particular case being considered, authorizing such an inference. But the authority of a decision is necessarily limited to the points decided. True, that sec-

act, and that he was acting under and by virtue of his authority as such agent.⁸¹

tion declares that 'whoever' does one of the several things therein mentioned 'shall be held an agent of such corporation to all intents and purposes'; but such agency, after all, is limited to the act of the particular person in doing one or more of the things thus specifically designated. In that sense, the word 'agent,' 'whenever used' in chapter S9, Rev. St., is to 'be construed to include all such persons.' *Id.* In other words, whenever an insurance company authorizes any person to do any one of the things thus specified, it cannot disclaim the agency of such person in the doing of anything necessarily implied in the specific act thus authorized. Thus, it has been frequently held by this and other courts, in effect, that, where a person was authorized by an insurance company to make a contract of insurance, he thereby had implied authority, in doing so, to waive stipulations as to the condition of the property, or other facts then existing; and, it may be, as to subsequent conditions, if such waiver is made at the time of effecting the insurance. But those cases have no bearing upon the question here presented. This contract of insurance was completed in all of its terms, and binding upon both parties, June 10, 1885. The plaintiff accepted it with all its conditions and limitations. In the absence of any fraud or mistake, he was, on general principles, conclusively presumed to know its contents. *Herbst v. Lowe*, 65 Wis. 321, 26 N. W. 751; *Brown v. Insurance Co.*, 59 N. H. 298. Thus, it appears that the policy was 'made and accepted' by the plaintiff with knowledge in law of its contents, 'upon the above express conditions,' to the effect that no local agent, at least, 'can in any manner waive either or any of the conditions of this policy.' With this policy in his possession, and more than nine months after the contract of insurance had been thus completed, the plaintiff, according to his testimony, requested the local agent to allow him permission, notwithstanding the conditions of the policy, to place the mortgage upon the premises, and claims that such agent answered: 'It is all right. Go ahead and make out the contract.' In other words, it is claimed that, notwithstanding the conditions and limitations in the policy, it was nevertheless competent for the local agent, without the knowledge or consent of the defendant, or any of its general officers, and without any consideration, and by mere words, to essentially change and modify the contract which had already been completed and binding upon the parties for more than nine months. Certainly, no such alteration of an existing contract, without the knowledge or consent of one of the parties to it, in any other business, would be permitted. We must hold that, when the assured has accepted a policy containing a clause prohibiting the waiver of any of its provisions by the local agent, he is bound by such inhibition, and that any subsequently attempted waiver, merely by virtue of such agency, is a nullity."

⁸¹ *Bohart v. Oberne*, 36 Kan. 284, 13 Pac. 388; *Chellis v. Coble*, 37 Kan. 558, 15 Pac. 505.

Where an agent was employed by a life insurance company, having assigned to him a district consisting of several counties,—his duties being to solicit risks, and forward applications to the company, his compensation to be a commission on the premiums received,—and, without the knowledge of the company, advertised his agency as a “branch office,” purchasing on his principal’s account furniture for fitting up an office, the court held that there was nothing shown in the character of his employment to imply authority to charge his principal with the expense of furnishing his office, or to make the purchase he did. Reid, J., said: “That an agent whose powers are limited cannot bind his principal, by virtue of his employment, by an agreement beyond its scope, is elementary.”⁸²

It would be a very extraordinary and dangerous proposition to hold that, because a person had authority to act for another in one matter, he could bind him by his acts in another and different matter. A. may employ B. to build him a house, and authorize him to purchase material for that purpose; but the fact that B.’s contracts for brick, lumber, and labor are ratified by A. does not justify the inference that B. has authority to insure the house when completed, and any engagements which he might make with the underwriter for that purpose would not bind A. The insurance business is one of large proportions. In certain of its departments its duties are simple, and in others exceedingly complex, requiring experience and skill of the highest order. In the successful management of these responsible affairs, persons are employed, we may suppose, in reference to their special fitness to perform certain designated duties. In the soliciting agent, who is appointed to take applications, to be forwarded to the company for its examination and approval, less experience and less technical knowledge are required. What he has been appointed to do involves less responsibility. His work is like that of a pioneer. It is preliminary and preparatory. The agent who has authority to make a binding contract, and to whom are intrusted blank policies, to be filled up and countersigned, occupies a position of greater trust, where better judgment and a longer experience with business affairs are required. The fact that this class of agents may, without consulting the general office, bind

⁸² Beebe v. Association, 76 Iowa, 129, 40 N. W. 122.

their principals for the payment of large sums of money, implies a degree of confidence which only tried integrity and a high order of business talents can inspire. The local agent must have moral character and sound judgment, but he need not be a skilled accountant; nor is it indispensable to his success that he should be possessed of extensive and accurate information in regard to the character and value of all kinds of property on which insurance is placed. In this particular there is a broad distinction between the duties of the local agent and the adjuster. The latter must be a rapid and accurate accountant, and, besides, must always have ready for immediate use every available fact in regard to the various kinds of property with which he is called to deal. He must be competent to compute the value of every manufactured product, and to estimate the labor and material in the largest structures. He must be familiar with the duties of the miller, mechanic, the artisan, and the common laborer. The duties of these classes of agents are clearly distinct, and persons appointed to take applications will have no implied powers to make contracts of insurance; nor will the local agent, with his large authority to bind his company by a completed contract, have an implied authority to adjust losses. These distinctions the courts have recognized with a concurrence of opinion that closely approaches unanimity.

§ 57. Local Agents cannot Waive Notice and Proofs of Loss.

Power to waive implies authority to act. One without the other is impossible. "Waiver" has generally been defined by the courts as the "voluntary relinquishment of a known right." Without the existence of a right, there can be no abandonment, for there would be nothing to abandon. The question, then, as to the power of an agent to waive notice and proofs of loss, must be considered in reference to his authority in respect to the settlement of claims. If the insurance company has carefully defined the duties of its local agent to be entirely separate and distinct from that of its adjuster, and has not been accustomed to appoint him to the performance of any important duties in respect to the care of damaged property or

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the computation of losses, nor in any manner held him out to the public as having authority in such matters, the agent, it is needless to say, will be wholly without authority, either real or apparent. If it were customary for local agents to adjust losses, then adjustment would be within the scope of every agent's apparent authority; but the fact being that adjustments, except in very rare instances, are directed in every detail by persons specially designated because of their exceptional skill and experience, there can be no reasonable inference that the local agent has any authority in respect to notice and proofs of loss.

Where the discussion involved the powers of the agent to waive the condition of the policy requiring the insured to furnish proofs of loss, it was shown by the evidence that the agent had the usual powers qualifying him to do all things necessary to the consummation of a binding contract of insurance,—to settle rates of premium and issue policies. From these undisputed facts the jury found that the agent had also authority to waive proofs of loss. The court held that such finding was unwarranted. "Something more than acts amounting to proof of a special agency must be shown. Authority, in fact, or apparent authority, justifying a stranger in dealing with him as his general agent, must be established. If the evidence merely establishes a special agency, a person deals with him, as to matters in excess of such apparent agency, at his peril. In all cases, in the absence of proof of actual authority, the question is whether authority to do the act relied upon is fairly within the scope of the agent's apparent authority, and in determining this question it is competent to show what acts the agent has been permitted to do by the company; and if the proof establishes nothing more than a special or limited authority, which does not fairly embrace the act in question, the assured, as to such matter, has dealt with him at his peril, and cannot charge the company beyond the scope of the agent's real or apparent authority. Authority to make a contract does not necessarily carry with it authority to change any of its details, or waive any of its provisions, after it is made and accepted by the other party. In order to establish such authority, it must be shown that he was in fact authorized to make the change, or that he has, with the knowledge of the company, held himself out and acted as

their general agent, or has previously done acts for the company that warranted the assured in believing that he had authority to do the particular act.”⁸³

The supreme court of Vermont considered the question here presented with careful elaboration, and reached a conclusion consistent with justice, and fully sustained by correct legal principles. A Mr. Henry R. Turner was the defendant's general agent, having the entire management of its business affairs in the New England states; and a Mr. Cudworth was its local agent at Brattleboro, Vt., who issued the policy. The loss occurred, and plaintiffs had some conversation with both Mr. Turner and Mr. Cudworth, the former of whom made partial investigations as to the origin of the fire, and the value of the property destroyed, as shown by testimony of plaintiffs, who claimed that the statements made by the general and local agents waived the stipulated proofs, which had not been furnished. In regard to Mr. Cudworth, the local agent, the court said: “We think he had no authority to waive that condition of the policy requiring a sworn statement in the settlement of a loss, although he might, unless restricted, waive conditions concerning the issuance of a policy, or anything apparently within the scope of his authority in the business committed to him. We recognize the full force of the rule as to the liability of the principal for the acts of an agent, as stated in *Insurance Co. v. Wilkinson*,⁸⁴ ‘that the powers of an agent are prima facie co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.’ The settlement of losses was no part of the

⁸³ *Lohnes v. Insurance Co.*, 121 Mass. 439; *Van Allen v. Insurance Co.*, 64 N. Y. 469; *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518; 16 Ins. Law J. 330.

This question was before the supreme court of Minnesota in the case of *Bowlin v. Insurance Co.*, 36 Minn. 433, 31 N. W. 859, and 16 Ins. Law J. 305. The policy there provided that in the event of a loss the assured should forthwith give notice in writing, and, within 30 days thereafter, render a particular account under oath. It was held that a local agent authorized only to make contracts of insurance, countersign and deliver policies, subject to the approval of the company, had no power to waive the provision. *Bonneville v. Assurance Co.*, 68 Wis. 298, 32 N. W. 34.

⁸⁴ 13 Wall. 222.

business of Cudworth. He was not, for that purpose, the defendant's agent."⁸⁵

The court then proceeds to consider Mr. Turner's relations to the case, and adds: "Turner was the general agent of the defendant, having supervision of all its affairs, and its adjuster of losses, and (unless restricted in his authority, the plaintiffs having notice thereof), we think, had all the powers of the company in the settlement of a loss to waive any of the conditions of the policy. * * * Having held that Turner had authority to waive any condition of the policy, the question remains whether he could do so save in the manner provided by the contract. One condition of the policy is that 'no officer, agent, or representative of the company should be held to have waived any of the conditions of the policy, unless such waiver was indorsed on the policy.' This provision was a valid one, binding upon the parties, and effect should be given it. While the defendant could give its oral consent to a waiver of the statement, no officer, agent, or representative could consent, unless the consent was indorsed on the policy. This point we think well taken. In *Carrigan v. Lycoming Fire Ins. Co.*,⁸⁶ the contract provided that no agent was empowered to waive any of its conditions without special authority, etc.; and it was held that this term referred to local agents, not general ones, and the case notes the distinction between the two. Here the limitation is upon the authority of any officer, agent, or representative. If Turner was not an officer, he was certainly a representative, and his want of authority to waive any condition, unless by writing indorsed on the policy, was brought to the knowledge of the plaintiffs by the contract itself; and, where an agent's acts are in excess of such authority, the principal is not bound.⁸⁷ Where an agent has apparent authority to do an act, his principal is bound; and, if the latter claims that the act is in excess of the agent's real authority, he should show actual notice to the party with whom he deals. In the case at bar the law presumes notice. It is a part of

⁸⁵ *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, and 17 Ins. Law J. 734; *Bowlin v. Insurance Co.*, 36 Minn. 433, 31 N. W. 859, and 16 Ins. Law J. 305; *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518, and 16 Ins. Law J. 330.

⁸⁶ 53 Vt. 418.

⁸⁷ Citing *Packard v. Insurance Co.*, 15 Ins. Law J. 475.

the contract. The plaintiffs agreed to it. Why should they be released from it?"⁸⁸

A case is reported in Wisconsin fully sustaining the rule of construction claimed by the Vermont court, above considered. One Gilbert was the local agent of the company, and the plaintiff claimed that the proofs of loss required by the terms of the policy had been waived by him. Lyon, J., said: "There is no proof that Gilbert had any authority in the premises beyond that of an ordinary local agent. Whatever power he may have had, when he made the contract of insurance, to waive conditions in the policy, he had no power, as a mere local agent, to waive such conditions afterwards. It was so held in *Hankins v. Rockford Ins. Co.*⁸⁹ We must therefore exclude from our consideration of the case the testimony of such conversation with Gilbert alone."⁹⁰

The general rule of law, that the principal will not be bound by the agent except when acting within the scope of his real or apparent authority, was clearly stated and explained by the New York court of appeals in *Weed v. London & Lancashire Fire Ins. Co.*⁹¹ The policy there was issued to the "Estate of O. Richards."

⁸⁸ *Walsh v. Insurance Co.*, 73 N. Y. 5; *Marvin v. Insurance Co.*, 85 N. Y. 278; *Forbes v. Insurance Co.*, 9 Cush. (Mass.) 470; *President, etc., of Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. (Mass.) 265; *Hale v. Insurance Co.*, 6 Gray (Mass.) 169; *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660, and 16 Ins. Law J. 744.

⁸⁹ 70 Wis. 1, 35 N. W. 34.

⁹⁰ *Barre v. Insurance Co.*, 76 Iowa, 609, 41 N. W. 373; *Weidert v. Insurance Co.*, 19 Or. 261, 24 Pac. 242; *First Nat. Bank of Waxahachie v. Lancashire Ins. Co.*, 62 Tex. 461, 14 Ins. Law J. 278; *McPike v. Assurance Co.*, 61 Miss. 37; *Lohnes v. Insurance Co.*, 6 Ins. Law J. 472; *Harrison v. Insurance Co.*, 9 Allen (Mass.) 231; *Tate v. Insurance Co.*, 13 Gray (Mass.) 79; *Clevenger v. Insurance Co.*, 2 Dak. 114, 3 N. W. 313; *Enos v. Insurance Co.*, 67 Cal. 621, 8 Pac. 379.

In the last case cited it was held that when the policy itself provides the manner in which its conditions can be waived or modified, as by indorsement, the change or abrogation of the condition can be accomplished in no other way. "The burden of showing that the agent possesses the powers of the principal is, under the terms of the policy, upon the plaintiff." *Garretson v. Insurance Co.*, 81 Iowa, 727, 45 N. W. 1047; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 46 N. W. 481.

⁹¹ 116 N. Y. 106, 22 N. E. 229.

Richards had died insolvent, and some time before his death conveyed by deed of trust, to one Sage, the mill property covered by the policy. Sage was to sell, and distribute the proceeds pro rata among Richards' creditors; and what remained of the proceeds after paying such debts, if anything, was to be paid to Richards, his heirs or legal representatives. Of this conveyance the defendant company had no knowledge when the insurance was effected, nor at any subsequent time until after the fire. The policy in suit contained a condition that it should be void if the interest of the insured in the property was other than entire, unconditional, and sole ownership, unless the fact was represented to the company, and expressed in the written part of the policy. To save an avoidance on account of the conveyance in trust to Sage, the plaintiff attempted to show that the adjuster had waived the forfeiture in his negotiations with the assured in respect to a settlement of the claim, after being informed of the Sage deed, and holding out, as was alleged, that the loss would be paid if additional proofs were made. Mr. Rice, the adjuster, it was not claimed had any authority to act for the defendant company, except in respect to the settlement of the loss. The referee to whom the matter was referred found that the acts of the adjuster were sufficient to create a waiver. To this conclusion the court dissented. It said: "It is well to bear in mind, in discussing the waiver which the referee found grew out of the facts set forth in the finding I have quoted, that the condition in the policy with reference to the statement therein of the title or interest of the assured was one precedent to the attaching of the risk. It lay at the threshold of the contract, and, if not then performed or then obviated, there was no enforceable agreement. The delivery of the policy and the breach of the conditions were concurrent acts, and, if the assured had not the sole and unconditional ownership of the property at the moment the policy was delivered, the condition was broken and the insurance was void. To say, therefore, that the condition was waived after a loss had occurred, is to hold, substantially, that a new contract had been made. Rice was not an officer or general agent of the company. He was a resident of Albany, engaged in an independent business as an insurance adjuster, giving his services to any person who wished to employ him. There is no evidence in the case to show that he

had any power whatever, except to ascertain and adjust the loss sustained by the assured, and the plaintiff is chargeable with knowledge of his power and the extent of his authority; nor is there any evidence that his knowledge of the Sage deed was communicated to the company, or any of its officers, or that any of the officers or general agents of the company ever recognized the validity of the policy after knowledge of its forfeiture."

The court then adds that, as Mr. Rice had no power to make a contract for the defendant company, any recognition on his part of the validity of the policy in suit would not in any important sense change the rights of the parties. It said: "The most liberal rule that has been established in cases of this character, which can be invoked in his favor [plaintiff's], is that the agent's power is co-extensive with the business intrusted to his care."²² The court then quotes the language of Judge Finch in deciding *Marvin v. Insurance Co.* He said, "The rule could go no further without violating all reason and justice." The reasoning of the court was that Rice, having no authority to make a contract between the parties, could not alter, modify, or change any of the conditions of a subsisting one; that he could not waive any of its conditions relating to the forfeiture, even had he intended to do so; that his duty was confined to the adjustment of the loss. Beyond that, he had received no authority to perform any act whatever, and anything which he might have done or undertaken to do, except in relation to ascertaining the loss, would be nugatory, and not binding upon his principal. The fact that Mr. Rice was an independent adjuster, employed by the defendant only for this particular occasion, does not make the case an exception to the general rule of law applicable to all classes of special agents. Whether Rice was employed by the defendant to investigate and adjust this one loss only, or whether he was continuously engaged in the performance of these special duties, has no significance whatever. It is only important to know what was the apparent scope of his authority. If there had not been conferred upon the adjusting agent the power to make contracts of insurance, then, under circumstances such as those con-

²² *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Pechner v. Insurance Co.*, 65 N. Y. 207; *Marvin v. Insurance Co.*, 85 N. Y. 283.

sidered by the New York court, no act of his would create an obligation on the part of his principal to pay a loss where no liability before existed. If the adjuster cannot bind his principal by a contract of insurance entered into understandingly and by positive agreement, it would be absurd to say that he can accomplish more by the indirect method of a waiver.

§ 58. Powers of an Attorney.

Persons dealing with an attorney should exercise the same care in ascertaining his authority to act as prudence would require them to do when dealing with any other class of agents. The authority of an "attorney in fact" will generally be found fully expressed in his appointment, and it will seldom occur that the limitations of such appointment can be safely disregarded. An "attorney at law," while acting in certain relations, will be held to have implied powers, as after bringing of suit it has been held that he could refer the cause; but the general rule is that an attorney at law has no implied authority to compromise or give up any right of his client.⁹³

It has been held in Iowa that under special circumstances an attorney at law may agree that a judgment be entered against his client, and the courts will enforce the agreement.⁹⁴ But this doctrine must be accepted within prudent limitations. It was pointedly repudiated by the supreme court of Illinois in *People v. Lamborn*.⁹⁵ In *Ohlquest v. Farwell*,⁹⁶ there were several suits brought in different counties, involving the same questions of both law and fact, and the attorneys stipulated that only one case should be tried, and that judgment should be entered in each of the other suits in accord with the verdict and judgment in the contested case. This having been done, and one of the parties being dissatisfied, he moved to have judgment in one of the cases set aside on the ground that the stipulation was made without his consent. In delivering the opinion of the court, Justice Beck states very clearly what an attorney can and cannot do in respect to waiving his client's rights. He says: "It is

⁹³ *Swinfen v. Swinfen*, 24 Beav. 549; *People v. Lamborn*, 1 Scam. (Ill.) 123; *Wadhams v. Gay*, 73 Ill. 415.

⁹⁴ *Potter v. Parsons*, 14 Iowa, 286.

⁹⁵ *Supra*.

⁹⁶ 71 Iowa, 231, 32 N. W. 277.

undoubtedly true that an attorney cannot consent to a judgment against his client, or waive any cause of action or defense in the case, neither can he settle or compromise it without special authority; but he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and as to these matters his client is bound by his action." To this statement the court adds, substantially, that in the exercise of his general authority the attorney may stipulate that the trial of one suit shall determine another, when the issues of law and fact are the same. There have been, so far as I can find, no deviations from the doctrine that an attorney, having authority to collect a claim without special instructions to compromise, is not empowered to accept payment at a less amount of money than the whole sum due.⁹⁷

An attorney has no power by his agreements to release an indorser, or any security which has been given for the benefit of his client; nor will any agreement by an attorney in behalf of his client, by reason of his implied authority, be sufficient to release a garnishee from the attachment of money or property in his hands. When an attorney holds paper for collection, he has no implied power to extend the time of payment, or to surrender one form of security and accept another. Except when an attorney at law is required to act in reference to matters connected with a suit, or in other legal proceedings, his implied powers will be regarded as practically the same as those of an ordinary agent, and persons dealing with him will be put on inquiry in respect to the limitations of his actual authority. How far the attorney can bind his client will, of course, frequently depend upon the circumstances under which action becomes necessary in order to secure a proper execution of the duties he has been directed to undertake. If the client is absent, living perhaps in a distant city, and his wishes can be ascertained only with difficulty and delay, the attorney may, if instant action is important, be excused in doing things which otherwise would not be justified. It may be said that

⁹⁷ *Martin v. Insurance Co.*, 85 Iowa, 643, 52 N. W. 534; *Hamrick v. Combs*, 14 Neb. 381, 15 N. W. 731; *Kelly v. Wright*, 26 N. W. 610, 65 Wis. 236; *Semple v. Atkinson*, 64 Mo. 506; *Isaacs v. Zugsmith*, 103 Pa. St. 77; *Whipple v. Whitman*, 13 R. I. 512.

ordinarily the attorney will be presumed to have authority to perform such acts as are incidental or indispensable to the accomplishment of the main purpose to which his appointment relates. Authority to settle a claim for loss carries with it the implied authority to receive payment, and to give the company a valid acquittance. But, as before stated, without special authority to do so an attorney cannot bind his client by a compromise settlement. The attorney being an officer of the court signifies nothing of importance, except as such official character may affect his relations with the court.

§ 59. Conclusions.

When the agent has an apparent authority to act in a particular matter, he may bind his principal; but if he is without real authority, and the principal sustains loss, the agent will be liable to him in an action for damages. So, too, it may occur that when an agent contracts to bind his principal, but fails to do so from want of authority, the agent himself will be required to perform the things which he had agreed the principal should do.

It is the duty of an agent, in the absence of definite instructions, to employ his best judgment to promote his principal's interests; but, if he disobeys positive orders, he will not be excused by showing that he acted in good faith, and that he had excellent reason to suppose that what he did would best advance his principal's interests. Thus, when the agent is directed to cancel a policy, but delays to do so, believing the risk desirable, and that the principal would so regard it when certain facts were explained, and pending such explanation the property burns, it must be paid for by the company, who afterwards may have its action against the agent to be reimbursed.

Risks which a company has accepted, and on which it has paid the agent his commissions, are beyond the control of the latter; and should he, without authority from the company, in a wanton or vindictive spirit, or to advance his own interests by placing the business elsewhere, proceed to a wholesale cancellation, such an act would constitute misconduct towards his principal, and make him liable in an action for damages, and for any money which he may have paid out for unearned premiums he will not be entitled to reimbursement.

When an agent exceeds his authority, or acts in relation to matters foreign to his appointment, his engagements are merely personal, and will not charge his principal. As one who has received authority only to make contracts of insurance, countersign and deliver policies, he cannot bind his company in respect to the settlement of claims. When an agent, acting beyond the scope of his authority, signs a submission to arbitrate, the principal may repudiate the act, and the agent will be bound to perform the award. This will be the case, irrespective of the fact of whether or not the agent acted in good faith, or whether or not the award returned was to the interest of his principal. The rule of law is based upon the fundamental proposition that every person has a right to choose for himself what he will do with his own; that his liberty cannot be restricted, nor his property rights interfered with, by the unauthorized act of another.

When an agent knowingly and intentionally sacrifices the interests of his principal, he forfeits the protection of the latter; and, when he colludes with the insured to defraud his principal, he becomes the agent of him whom he thus collusively serves.

While the rule admits of no exception, that a person cannot at the same time, and in the same matter, be the agent of both the insured and insurer, he may, in one transaction, acting in respect to different things, serve both parties without impropriety.

An agent cannot delegate his authority to another. The maxim is, "*Delegatus non potest delegare.*" While the rigidity of this rule has been preserved, the courts, with constructive ingenuity, have made it to conform to the conveniencies of business. The acts of the agent's clerk or assistant are construed to be the acts of the agent himself; and thus it has occurred, as in a recent Illinois case, that the principal is bound by the engagements of a stranger.

An agent will be liable for the acts of his broker. When the principal has instructed his agent to cancel a risk, and the latter intrusts performance of the duty to the broker through whom the risk was obtained, if the latter fails to act promptly, and a loss occurs, the agent will be liable. In such case the agent will not be excused by reason of the existence of a local custom to effect cancellation through the broker from whom the risk was received.

One having the agency of an insolvent company, and knowing it
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to be such, who induces persons to accept its policies, makes himself personally liable to those whom he has deluded, for any loss sustained on account of his misrepresentations. In other words, when an agent knowingly misleads the insured to his injury, the agent will be liable to him in an action for damages.

When the agent, at the time of delivering the policy, agrees by parol as to matters of future performance, contrary to the express terms of the written contract, the insurer will not be bound by such parol agreement, and the agent will be personally held to the insured.

An agent cannot pay his own debts with the money of his principal, nor can he receive merchandise in payment of premiums, unless authorized to do so by the company. If the insured delivers to the agent goods from his store to pay the premium on a policy, or gives him credit on account, and the agent subsequently fails to remit to the company the sum due, the policy will be without consideration, and, in the event of loss, could not be enforced. When, however, the premium is paid in money to the agent, the case is otherwise. In that event the insured is charged with no responsibility in the matter.

The law will not permit an agent to place himself in a position where his own interests will be adverse to those of his principal. Where the agent has the power to act, he will also have presumptively the power to waive. "Waiver" is defined by the courts as the relinquishment of a known right. Such rights and powers, therefore, as have not been conferred upon the agent, he will not possess, and that which he does not possess he cannot relinquish.

The agent is not necessarily the alter ego of the principal; for, in most cases, while some powers are given, others are reserved. The principal has the exclusive right of decision whether the agency shall be general or special, but the law will in all cases presume that the agent has authority co-extensive with the employment to which he is appointed.

The legal effect of a word spoken or an act performed by an agent, in respect to matters within the scope of his employment, is the same as though the principal had spoken or acted in person. "Qui facit per alium facit per se."

CHAPTER III.**TITLE AND OWNERSHIP.**

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§ 60. Who may Insure.

Any person may insure who has an interest in the property subject to damage or destruction by fire. An insurable interest does not

necessarily imply ownership. A lessee has a tangible and often valuable interest in the property leased, which may be protected by insurance.¹ So, too, has a mortgagee in buildings covered by the mortgage.² An agent sometimes has an insurable interest in the goods of his principal, and a bailee, whether personally liable or not, can insure property of which he has the custody. It is, however, a common provision of the insurance contract that if the insured be not the sole and unconditional owner of the property insured, or if there be any other person interested therein, the fact must be represented to the company; and, in default of making such disclosures, it is provided that no liability shall exist as to the insurer. Sometimes the contract is conditioned to be valid only when the insured has a fee-simple title. Whatever may be the requirement of the policy in these particulars, substantial compliance is indispensable. Sir Edward Coke has defined title as "the means whereby the owner of lands hath the just possession of his property." This definition was accepted by Blackstone. Still, it will appear to most persons unsatisfactory and insufficient. A person may have the legal title to an estate, while its possession is in another. Ownership and possession may be enjoyed by one person, while another holds the legal title, and this without force, violence, or fraud. When property is sold and not delivered, both the vendor and the vendee will generally have an insurable interest.³ Where the purchaser of real estate

¹ Lessee and lessor have each insurable interests. *Ely v. Ely*, 80 Ill. 532; *Mayor, etc., of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231; *Miltenberger v. Beacom*, 9 Pa. St. 198; *Allen v. Insurance Co.*, 36 La. Ann. 767; *Niblo v. Insurance Co.*, 1 Sandf. (N. Y.) 551; *Fletcher v. Insurance Co.*, 18 Pick. (Mass.) 419; *Mitchell v. Insurance Co.*, 32 Iowa, 421; *Mt. Leonard Milling Co. v. Liverpool & L. & G. Ins. Co.*, 25 Mo. App. 259.

² Both mortgagor and mortgagee may insure. *Kellar v. Insurance Co.*, 7 La. Ann. 29; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; *Fox v. Insurance Co.*, 52 Me. 333; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *McDonald v. Black*, 20 Ohio, 185; *Strong v. Insurance Co.*, 10 Pick. (Mass.) 40; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Higginson v. Dall*, 13 Mass. 96; *Kase v. Insurance Co. (N. J. Sup.)* 32 Atl. 1057; *Donaldson v. Insurance Co.*, 95 Tenn. 280, 32 S. W. 251.

³ The vendor will have an insurable interest in the property sold, to the extent of any lien which he may retain to secure payment of any part of the purchase money. The interest of the vendee embraces the full value of the property. *Wood v. Insurance Co.*, 46 N. Y. 421; *McCutcheon v.*

is in possession, holding a contract for a deed, both the seller and the buyer have an interest in the property which is the proper subject of insurance.

The interest necessary to support an insurance may be legal or equitable. Even such incidental relations to the property as that of carrier or bailee, without liability, will be sufficient.*

The inchoate right of curtesy which a husband has in the estate of his wife is an interest sufficiently tangible to be made the subject of insurance, when the husband and wife, living in relations of amity, possess and enjoy the property. The insurer's promise of indemnity in such a case, however, will only rest on full and exact representations of interest. A husband cannot insure the property as his own.^b

A builder may protect himself for work begun or finished, and for materials supplied.^c But such liability as may be created by contract to complete work within a stipulated time is not covered by an

Ingraham, 32 W. Va. 378, 9 S. E. 260; State Mut. Fire Ins. Co. v. Updegraff, 21 Pa. St. 513; Trumbull v. Insurance Co., 12 Ohio, 305; Stuart v. Insurance Co., 2 Cranch, 442; Reed v. Insurance Co., 74 Me. 537; Redfield v. Insurance Co., 56 N. Y. 354; Shotwell v. Insurance Co., 5 Bosw. (N. Y.) 247; Tuckerman v. Insurance Co., 9 R. I. 414; Rumsey v. Insurance Co., 17 Blatchf. 527, 1 Fed. 396; Ayres v. Insurance Co., 17 Iowa, 176; Rider v. Insurance Co., 20 Pick. (Mass.) 259; Kenny v. Clarkson, 1 Johns. (N. Y.) 385; Cumberland Bone Co. v. Andes Ins. Co., 64 Me. 466; Rohrback v. Insurance Co., 62 N. Y. 47.

* Agent, bailee, and consignee. De Forest v. Insurance Co., 1 Hall (N. Y.) 87; Aetna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242; Graham v. Insurance Co., 2 Disn. (Ohio) 255; Shaw v. Insurance Co., 49 Mo. 578; Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420; Davis v. Insurance Co. (Cal.) 43 Pac. 1115.

^b The insured property was owned by the wife, while the policy was written in the name of her husband, and the fact of ownership in the wife was not disclosed. Held, that there could be no recovery by either husband or wife. The claim of the husband, if true, that he was acting as his wife's agent, did not excuse the withholding of facts in regard to ownership. Pelican Ins. Co. v. Smith (Ala.) 18 South. 105; German Ins. Co. v. Hunter (Tex. Civ. App.) 32 S. W. 344; Continental Ins. Co. v. Chew, 11 Ind. App. 330, 38 N. E. 417; Trade Ins. Co. v. Barracloiff, 45 N. J. Law, 543; Cohn v. Insurance Co., 3 Hughes, 272, Fed. Cas. No. 2,970; Dittenbaugh v. Insurance Co., 150 Pa. St. 274, 24 Atl. 746; Harris v. Insurance Co., 50 Pa. St. 349.

^c Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; Franklin Fire Ins. Co. v. Coates, 14 Md. 285.

insurance on the building. Contingent losses of such character are more in the nature of uses and rents, and may be provided for under a proper form of policy, expressing specifically the intention of the parties.

§ 61. Concerning the Right of a Husband to Insure His Wife's Property.

In several states it has been held that the husband has an insurable interest in the property of his wife, while in other states a different rule prevails; but, even when the law recognizes the husband as having a right to the use and control of his wife's estate, he cannot maintain an insurance in his own name; and, when the policy provides for a disclosure of title, it will not be sufficient for the husband to represent that it is his. In several of the states the right of a married woman in respect to the ownership and control of property is definitely fixed on a basis as independent of the husband as of any other person. The contingency that she may die without owing debts, and that her estate may possibly descend to her husband, does not create an insurable interest on his part. A son may have a reasonable expectancy of inheriting the property owned by his father, but such fact would not give him a right to insure such property in his own name. Interests of this kind are too uncertain and contingent to be the subject of an insurance contract. A policy written to protect these intangible and contingent interests would be subversive of public morality, the security of property, and the best good of society, on account of its wager character.⁷

The supreme court of Maine, in the case of *Clark v. Dwelling-House Ins. Co.*,⁸ discusses this matter. The property there belonged to the wife, and was insured by the husband. The court said, in answer to the question, has a husband, under the laws of Maine, an insurable interest in the property which he has conveyed in fee simple to his wife that "our statutes seem to have removed the last vestige of the common-law marital rights of a husband in the real estate of his wife, however she may have acquired it. His only rights now in real estate he conveys to his wife are a naked veto of a con-

⁷ *Trott v. Insurance Co. (Me.)* 22 Atl. 245.

⁸ 81 Me. 373, 17 Atl. 303.

veyance by her in fee, and the possibility of taking by descent from her at her decease, depending upon his survivorship and her solvency. Her creditors have more right than he in such estate. She may manage the property without the joinder or assent of her husband, and she may make him her agent or not, as she chooses. The law gives the wife the entire control over such property in every respect, except the power of conveyance in fee; and, even if it be a homestead, he can occupy it only by her consent. It is subject to be taken by her creditors. A married woman is not limited in the management of her property, however obtained. She may control its income. She may lease it without her husband's consent, and her lessee may expel him from the possession. During her lifetime, he has no interest, not even a right of occupancy. If he survives her, and her estate is solvent, he acquires by these events a new interest, and by way of descent only. He would be no more affected by the burning of her house than he would be by the burning of any house which he was merely occupying rent free, or which he might possibly inherit. It has never been held, as far as we know, that a son has an insurable interest in the property of his father, which he had only a chance of inheriting; nor has it been held, to our knowledge, that a mere occupier without any estate or claim of right has an insurable interest. The burning of this house undoubtedly subjects the plaintiff to inconvenience, and perhaps to the expense of providing another home. So would he had he been living rent free, and at sufferance in the house of his father or brother or son, in which he had no estate. While he may be affectionately concerned about his wife's property, we do not see that he has any pecuniary interest in it, legal, equitable, or even ponderable, or which the courts can measure or which he can insure under our law. * * * The possible estate the husband may acquire by descent after the death of his wife, if he survives her, and she be solvent, has no existence before her death. Before her death he has no estate, but only a chance of acquiring one. The wife's right of dower exists in her husband's lifetime, though it is then inchoate, but we know of no case where a wife has attempted to insure such a right."

In several of the states a different rule prevails; and in some the insurable interest of the husband in the wife's property is recognized by the courts as embracing its entire value. But even in such states

a disclosure of the nature and extent of the interest must be made when the terms of the policy so require. The insurer, under different circumstances, may be willing to protect any tangible interest; but he has always the right of decision,—a right which cannot be intelligently exercised unless the interest, if less than absolute ownership, is fully disclosed.⁹

§ 62. When the Insured must Disclose His Title.

In regard to the character and circumstances of his title, the insured is not bound to make any disclosures, unless inquired about, or it is required that he should do so by the provisions of the policy. If he has a tangible interest,—that is, if he will suffer loss in the event that the property burns,—then he may insure without particularly defining the nature or extent of his interest, unless, as before stated, he be interrogated in relation thereto, or exact and particular information is called for by the terms of the policy. But it will seldom occur that the insurer will be found so indifferent concerning matters of such vital importance as title and incumbrance as to accept a risk without calling for the fullest disclosure; and this is generally done by incorporating into the policy a condition that no liability shall attach if the property insured is incumbered, or if there be any other person interested therein, unless such interest or incumbrance be represented to the company. When a contract is thus expressed, any concealment, whether fraudulently intended or not, in regard to title, ownership, or incumbrance, will be fatal to a recovery under the policy;¹⁰ but, as the form of the insurance con-

⁹ The Code of Louisiana gives the husband such a right to the use and control of the personal property of his wife that he may insure it in his own name, without particular explanations as to the limitation of his interest. *Clarke v. Insurance Co.*, 18 La. 431.

It was held in Kentucky that a husband who is tenant by the curtesy, and has issue, may insure his wife's property in his own name to its full value. *Franklin Marine & Fire Ins. Co. v. Drake*, 2 B. Mon. 47; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *McLean v. Hess*, 16 Ins. Law J. 227, 106 Ind. 555, 7 N. E. 567; *Kyte v. Assurance Co.*, 149 Mass. 116, 21 N. E. 361, 16 Ins. Law J. 330; *Harris v. Insurance Co.*, 50 Pa. St. 341; *Travis v. Insurance Co.*, 32 Mo. App. 198; *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428.

¹⁰ Title and incumbrances need not be disclosed, unless inquired about. The

tract now in common use does not permit the insured to withhold any important fact in regard to these circumstances of the risk, it is not necessary to inquire more particularly what would be the rights of the parties were the case otherwise. In the growth of the insurance business, it has been found necessary, to prevent concealment of important facts affecting the hazard, to make it a condition of liability that the insured shall disclose, whether particularly inquired about or not, every fact in regard to title, incumbrance, additional insurance, and other matters which the insurer deems material in fixing the value and character of the risk; and, as questions will hereafter arise only under contracts of this form, it will be useless to discuss any other. Many of the earlier decisions related to questions of law arising under a form of contract no longer in use.

terms of the policy required that the interest of the insured should be represented, if he was not the sole and unconditional owner. *Hall v. Insurance Co.*, 93 Mich. 184, 53 N. W. 727. Supporting this ruling is *Rochester Loan & Banking Co. v. Liberty Ins. Co.* (Neb.) 62 N. W. 877.

Elsewhere it seems that a different rule prevails. See *McFetridge v. Insurance Co.*, 84 Wis. 200, 54 N. W. 326; *Schroedel v. Insurance Co.*, 158 Pa. St. 459, 27 Atl. 1077; *Home Ins. Co. v. Smith* (Tex. Civ. App.) 29 S. W. 264; *Mers v. Insurance Co.*, 8 Ins. Law J. 505, 68 Mo. 127; *Adema v. Insurance Co.*, 36 La. Ann. 660; *Waller v. Assurance Co.*, 10 Fed. 232; *Hinman v. Insurance Co.*, 36 Wis. 159; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Rohrbach v. Insurance Co.*, 62 N. Y. 47; *Richardson v. Insurance Co.*, 46 Me. 394; *Kibbe v. Insurance Co.*, 11 Gray (Mass.) 163; *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.) 415; *Smith v. Insurance Co.*, 6 Cush. (Mass.) 448.

In the absence of provisions in the policy calling for statement of the nature of the interest of the assured, unless inquired of, it may be said that he is not bound to disclose the condition of title and interest. The possession of an insurable interest would be sufficient, and would support an allegation of ownership. *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; *Gilman v. Insurance Co.*, 81 Me. 488, 17 Atl. 544; *Vankirk v. Insurance Co.*, 79 Wis. 627, 48 N. W. 798; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77; *Dwelling-House Ins. Co. v. Hoffmann*, 125 Pa. St. 626, 18 Atl. 397; *Guest v. Insurance Co.*, 66 Mich. 98, 33 N. W. 31.

§ 63. The Policy Becomes Void When the Insured's Interest in the Property is Changed.

In the case of *Weed v. London & L. Ins. Co.*,¹¹ it appears from the facts stated that one Richards, becoming insolvent, conveyed his mill by deed of trust to Dean Sage, who was to sell the property, and apply the proceeds in payment of Richards' debts. Afterwards, and before the trust was executed, Richards died, and the policy in suit was issued, covering the property thus deeded to Sage, and without any knowledge on the part of the insurer of such conveyance. It was one of the conditions of the policy that it should be void unless the interest of the assured was an entire, unconditional, and sole ownership. The New York court of appeals said: "This condition as to the ownership of the property was precedent to the attaching of the risk, and, as Richards' estate had no title, it was broken upon the delivery of the policy. Upon this point of the case, therefore, the plaintiff failed to prove a valid contract, and was not entitled to recover."¹²

Where the title is in two persons jointly, as husband and wife, neither will be "sole owner."¹³ Naked possession is not ownership, within the meaning of an insurance policy, even though such possession is undisputed.¹⁴ So, too, one is not owner who is in possession

¹¹ 116 N. Y. 106, 22 N. E. 229.

¹² In *Collins v. Insurance Co.*, 44 Minn. 440, 46 N. W. 906, it was provided that the policy should be void unless the interest of the insured was that of sole and absolute ownership. The plaintiff had only a life estate. The court said: "Of course, she had an insurable interest, but that interest was not insured. The policy expressly excluded from its operation any interest other than the absolute and sole ownership." *Home Ins. Co. v. Smith* (Tex. Civ. App.) 29 S. W. 264; *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630, 21 S. E. 828; *German Ins. Co. of Freeport, Ill., v. Hayden* (Colo. Sup.) 40 Pac. 453; *German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344; *Hebner v. Insurance Co.* (Ill. Sup.) 41 N. E. 627.

¹³ *Schroedel v. Insurance Co.*, 158 Pa. St. 459, 27 Atl. 1077; *Pelican Ins. Co. v. Smith* (Ala.) 18 South. 105; *German Ins. Co. v. Hunter*, supra; *Hebner v. Insurance Co.*, supra; *Webster v. Insurance Co.* (Ohio) 42 N. E. 546; *Home Mut. Fire Ins. Co. v. Hauslein*, 60 Ill. 521; *Cohn v. Insurance Co.*, 3 Hughes (U. S.) 272, Fed. Cas. No. 2,970; *Aetna Ins. Co. v. Resh*, 40 Mich. 241.

¹⁴ *Porter v. Insurance Co.*, 2 Flip. 100, 6 Ins. Law J. 928, Fed. Cas. No. 11,286.

of property of which he enjoys the emoluments, by reason of a donation *inter vivos*, with promise to convey.¹⁵ And the fact that he has paid taxes and made valuable improvements does not have the effect in law to create ownership. One person may hold the legal title to property of which another is the owner.¹⁶ When this occurs, as it frequently does in securing loans, both parties will have an insurable interest; the one holding the legal title to the amount of his loan, and the owner to the full value of the property. In form, only, is there a sale of the property. The legal effect of such transactions is to place the parties in the relation of mortgagor and mortgagee.¹⁷

A stockholder in a corporation has an interest in the corporate property, which may be protected by insurance. While the property is beyond the control of the shareholder, and his interest in any specific subject of insurance indeterminate, it is easily demonstrated that he will suffer a loss by the occurrence of a fire.¹⁸

"An equitable owner is an entire and sole owner."¹⁹ So, too, the ownership is absolute in the holder of an equitable title, when it is not held in trust, and the right to convey exists.²⁰ Ownership of this kind is very common. A. sells to B., who takes a contract of purchase, conditioned that, when certain payments are made, the former will execute to the latter a legal title. B. becomes the sole and unconditional owner of the property when he enters into possession, under a contract of this character; and the relations of the parties thereafter are those of mortgagor and mortgagee. Both have insurable interests. One may insure to protect the security he holds for the payment of the mortgage indebtedness, and the other

¹⁵ *Wineland v. Insurance Co.*, 53 Md. 276; *Miller v. Insurance Co.*, 46 Mich. 463, 9 N. W. 493.

¹⁶ *Henning v. Assurance Co.*, 77 Iowa, 319, 42 N. W. 308.

¹⁷ *Hawley v. Insurance Co.*, 102 Cal. 651, 36 Pac. 926.

¹⁸ *McCormick v. Insurance Co.*, 66 Cal. 361, 5 Pac. 617; *Id.*, 86 Cal. 260, 24 Pac. 1005; *Syndicate Ins. Co. v. Bohn*, 12 C. C. A. 531, 65 Fed. 165; *Seaman v. Insurance Co.*, 18 Fed. 250; *Warren v. Insurance Co.*, 31 Iowa, 464; *Riggs v. Insurance Co.*, 51 N. Y. Super. Ct. 466; *Buck v. Insurance Co.*, 1 Pet. (U. S.) 163; *Philips v. Insurance Co.*, 20 Ohio, 174.

¹⁹ *Franklin Fire Ins. Co. v. Crockett*, 7 Lea (Tenn.) 725.

²⁰ *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149, 4 Atl. 8; *Wainer v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877.

to save himself from direct loss should the buildings or other property burn.²¹

§ 64. When Insured's Interest is Less than Sole and Unconditional Ownership, It must be Disclosed.

Under all forms of policies now in use, the insured is not only required to particularly state his interest, if it be less than that of "sole and unconditional ownership," but he must also give the insurer notice of any changes which may take place in possession or interest.²² The underwriter is accustomed to compute the measure of the

²¹ *Johannes v. Fire Office*, 70 Wis. 196, 35 N. W. 298; *People's St. Ry. Co. v. Spencer*, 156 Pa. St. 85, 27 Atl. 113; *Martin v. Insurance Co.*, 44 N. J. Law, 485; *Millville Mut. Fire Ins. Co. v. Wilgus*, 88 Pa. St. 107; *Pelton v. Insurance Co.*, 77 N. Y. 605, 13 Hun, 23; *Coursin v. Insurance Co.*, 46 Pa. St. 323.

"Where articles of agreement are entered into for the sale of land, the purchaser is considered the owner. It does not seem to be necessary, to produce this effect, that any part of the purchase money shall be paid. It results from the contract. If the land increases in value, it is his gain. If it decreases, or if improvements are destroyed by fire or otherwise, it is his loss." *Siter's Appeal*, 26 Pa. St. 180; *Elliott v. Insurance Co.*, 117 Pa. St. 548, 12 Atl. 676; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668; *Dupreau v. Insurance Co.*, 76 Mich. 615, 43 N. W. 585; *Gaylord v. Insurance Co.*, 40 Mo. 13; *Woody v. Insurance Co.*, 31 Grat. (Va.) 362; *Lewis v. Insurance Co.*, 29 Fed. 496; *Smith v. Insurance Co.*, 91 Cal. 323, 27 Pac. 738; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257, 16 Ins. Law J. 345; *Hamilton v. Insurance Co.*, 98 Mich. 535, 57 N. W. 735; *Knop v. Insurance Co.*, 101 Mich. 359, 59 N. W. 653.

²² The policy stipulated that "if the property should be sold, or the title or possession thereof be changed, it should be void." The insured afterwards conveyed to A., by title deed. A. conveyed to B., and the latter gave a bond to the insured, that, on the payment of the debt which these several transfers were made to secure, he would reconvey. Held that, under the Code of Georgia, there was such alienation as voided policy. *Phoenix Ins. Co. v. Asberry*, 95 Ga. 792, 22 S. E. 717.

Change of title avoids policy. *Snow v. Oil Co. (Tex Civ. App.)* 34 S. W. 177. J. and K. were partners in mercantile business, and insured as a firm. During the term of the policy, K. sold his interest to J., and took the latter's note for the purchase price. It was agreed that, if the note was not paid at maturity, K.'s interest in the stock should continue until payment was made. The policy provided that it should become void, if, without the consent of the company, the insured property should be sold, or if the title or possession, or any part

hazard he assumes by the care guarantied for its protection, and this he understands will depend in a very large degree upon the interest of the insured. If such interest be important, the risk will be carefully watched. If it be small, care and vigilance will be likely to fall into desuetude. This is a reasonable judgment of what is likely to occur so often as to affect seriously the success of their ventures. It is based upon principles of conduct that are fundamental in the human character.

§ 65. When Alienation Occurs.

Generally there will be no alienation while the risk continues that of the vendor; and this, too, although the agreement to sell is in writing, and part of the purchase money has been paid, and the purchaser is in possession. The agreement must be so far executed that the title has passed to the vendee. This proposition frequently involves questions of much difficulty, concerning which the courts have differed.²³

thereof, should be changed. The court said: "There is no room for dispute that the possession was changed. K. had no more the possession of the goods than he would have had under an absolute sale, with a lien thereon. There was such a change of possession, if not of title, as to void the policy." *Jones v. Insurance Co. (Iowa)* 66 N. W. 169.

Where property was leased to vendor at nominal rent, with option to repurchase at expiration of lease, held, that vendee's interest was qualified, being subject to the equitable interest of vendor, an interest capable of being specifically enforced. *People's St. Ry. Co. v. Spencer*, 156 Pa. St. 85, 27 Atl. 113.

Held, that partition of property among heirs was such change as to cause a forfeiture. *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848, overruling *Crook v. Insurance Co.*, 38 Mo. App. 582.

Held, that sole ownership was not terminated by foreclosure proceedings until the sheriff's deed had been acknowledged. Both title and ownership, although in great peril, continue to that point. *Collins v. Assurance Corp.*, 165 Pa. St. 298, 30 Atl. 924; *Davidson v. Insurance Co.*, 71 Iowa, 532, 32 N. W. 514.

²³ *Boston & Salem Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.) 381; *Masters v. Insurance Co.*, 11 Barb. (N. Y.) 624; *Perry County Ins. Co. v. Stewart*, 19 Pa. St. 45; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421; *Davis v. Insurance Co.*, 10 Allen (Mass.) 113; *Trumbull v. Insurance Co.*, 12 Ohio, 305; *Fire & Marine Ins. Co. v. Morrison*, 11 Leigh (Va.) 354.

It is often a question, too, of much doubt, and one concerning which the courts have disagreed, at what time a sale is completed, so as to become an alienation within the terms of an insurance policy. In *Benjamin on Sales*²⁴ we find a statement of the law as follows: "So, if, also, by a fair construction of the contract, the vendor is to weigh or measure the article sold, in order to ascertain the whole sum to be paid, as where an unknown quantity is sold by the pound, yard, etc., the title does not generally pass until the vendor has done his part, unless the contrary intent sufficiently appears, not because weighing or measuring is in and of itself important, but because the parties have agreed that the vendor shall do it before the title passes; therefore it must be done."²⁵

In *Nesbit v. Burry*,²⁶ the court held that if, by the contract, the weighing was to take place before the sale was completed, and the mode of weighing agreed upon failed, and the vendor refused to have the articles weighed in any other way or to deliver them, the title did not pass.

In *Joyce v. Adams*,²⁷ A. sold J. 259 bales of cotton, at 13½ cents per pound, and J. paid down \$5 per bale. By the bargain, J. was also to pay for storage, insurance, and interest; the cotton being delivered 30 days from date, cash on delivery. The custom was for the seller to weigh the cotton at his own expense, and repair the bales, if need be, and send the weigher's certificate to the buyer, with the bill of the parcels, weight, and price. Before this was done, the cotton was destroyed by fire in the possession of A., and J. brought suit to recover back his advance of \$5 per bale. It was held the title had not passed.

So, in *Straus v. Ross*,²⁸ R. sold S. his entire crop of wool for 1864. at 80 cents a pound. S. paid \$20 down, and was by a certain date to call on R. to go to a neighboring town for the wool to be weighed, and

²⁴ Page 264.

²⁵ *Kein v. Tupper*, 52 N. Y. 550; *McClung v. Kelley*, 21 Iowa, 508; *Frost v. Woodruff*, 54 Ill. 156. See other cases there cited.

In *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615, plaintiff had given his brother a bill of sale. There was no consideration,—no change of possession. Held, that vendee had only a colorable title; that what had been done did not constitute alienation, within the meaning of the policy.

²⁶ 25 Pa. St. 209.

²⁷ 8 N. Y. 291.

²⁸ 25 Ind. 300.

pay the balance of the purchase money. S. did not call on R. at the time stated, and R. sold the wool at an advance to other parties. It was held that the title did not vest in S., and that he could not recover damages of R. for nondelivery of the wool. See, also, *Lester v. East*,²⁹ and cases cited.

In *McDonald v. Hewett*,³⁰ H. sold to M. a lot of timber on the bank of the Hudson river. H. was to deliver the same in New York City, and M. was to pay for the same when delivered, inspected, and measured in New York. H. sent the timber to New York, but refused to deliver it to M., and transferred it to other parties. It was held the sale was not complete, as it had not been inspected and measured.

Benjamin on Sales³¹ further says: "It is not important who is to do the weighing or measuring, except as that fact may indicate the intention of the parties as to the time the title is to pass. Thus, where the sale is for cash, to be paid for as soon as weighed, and no provision for unconditional delivery, the weighing, and consequently determining the price to be paid, is a condition precedent to a completed sale."

In *Ward v. Shaw*,³² W. sold to C. a pair of cattle, which C. was to take into his possession, slaughter them, take the quarters to market, weigh them, and pay \$7.50 for each hundredweight. Immediately after C. took possession, his creditors attached the cattle as theirs, but the title was held not to pass before the slaughtering and weighing,—things to be done by the vendee.

In *Burson v. Fire Association*,³³ one Flory had bought a stock of goods of the plaintiff, and was in possession, under an agreement that the stock should become his when paid for. He had made one or two payments under the terms of the agreement. The plaintiff had signed a contract, which stipulated, among other things, that the goods should be his until paid for. The purchaser, Flory, was selling the stock in the regular course of business. Paxon, C. J., said: "I am unable to see why the plaintiff was not the sole and unconditional owner of the property insured, within the meaning of the policy. The evidence is not disputed that the entire legal title to it was in the plaintiff at the time the insurance was effected; that by the very terms of the lease

²⁹ 49 Ind. 588.

³⁰ 15 Johns. (N. Y.) 349.

³¹ Page 268.

³² 7 Wend. (N. Y.) 404.

³³ 136 Pa. St. 267, 20 Atl. 401.

or bill of sale, by whatever name it may be called, from the plaintiff to Flory, it was stipulated that the ownership should remain in the plaintiff until the last dollar was paid. * * * As between the plaintiff and Flory, and as between the plaintiff and the insurance company, the title was in the plaintiff. The fact that Flory had made payments on account to the plaintiff did not give title pro tanto to Flory. This is because they had agreed that it should not; that, until the last dollar was paid, the title was to remain in the plaintiff. In the meantime, the goods remained the property of the plaintiff; and, when destroyed by fire, the loss was his. He must hand over the goods to Flory when the last payment is made, or if that is not possible, owing to their destruction, he must return to him the money he has paid. The contract between the plaintiff and Flory must be executed as they have made it, so long as it is not interfered with by some one who has a right to call its validity in question." While no general rule is clearly discernible for determining the exact time when preliminary negotiations end and the final word is spoken, or the final act performed, that completes the sale. In most of the cases examined, it has been seen that the courts have applied the test as to whether conveyance of title could be compelled in an action for specific performance.³⁴

³⁴ It was stipulated in the lease that should the party of the second part pay on or before November 3d an additional sum of \$26.85, then the party of the first part doth sell, transfer, and convey unto the party of the second part the absolute title and ownership of said property. Held, that the language of the contract imported sale. *Fire Ass'n of Philadelphia v. Flournoy*, 84 Tex. 632, 19 S. W. 793; *East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 24, 15 S. W. 166; *Cottingham v. Insurance Co.*, 90 Ky. 439, 14 S. W. 417; *Marks v. Tichenor*, 85 Ky. 536, 4 S. W. 225; *Calhoon v. Belden*, 3 Bush (Ky.) 674.

"It is the vendor's parting with the beneficial interest in the property that vacates his contract of insurance." See, also, *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172.

An executory contract of sale, with possession in the vendee, is a change of ownership, and is held by the Pennsylvania court a change of title. *Ladd v. Insurance Co.*, 70 Hun, 490, 24 N. Y. Supp. 384; *Hamilton v. Insurance Co.*, 98 Mich. 535, 57 N. W. 735. Other authorities are *Grable v. Insurance Co.*, 32 Neb. 645, 49 N. W. 713; *Wich v. Insurance Co.*, 2 Colo. App. 484, 31 Pac. 389; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079.

In this case it was held that any change of title, or an ownership with

Assignment for the benefit of creditors is such change of title, ownership, and possession as will cause a forfeiture, under the form of policy in general use. Assignments of this character may, and often do, result in a permanent alienation of the property insured. It is at once put beyond the control of the insured, and it may be said that the proceedings contemplate that the assets of the assignor will be sold and finally disposed of by the assignee, and the proceeds distributed among the creditors. When this occurs, the alienation is complete and final.

In *Orr v. Hanover Fire Ins. Co.* the court stated its conclusion of the law as follows: "Upon the execution and delivery of the deed of assignment, all the title and interest originally held by the assignor passed from him to the assignee. His legal interest was gone. The right of possession was gone, and the assignee was clothed with the right and power to sell and convey the property, and distribute the proceeds among the creditors. After the assignment, the assignor has no more control over the property than he would have in the case of an absolute sale."³⁵

§ 66. When Holding an Executory Contract of Purchase is not Ownership.

In *Brown v. Commercial Fire Ins. Co.*,³⁶ the assured held the property under an executory contract to purchase, by which the vendor, who was plaintiff in this action, agreed to convey the property upon the payment of \$7,000; and it was also provided in the contract that if assured failed to make the payments of the purchase money, or either of them, the contract should, at the option of the vendor, be forfeited; and it appeared the assured had paid no part of the pur-

less qualification, did not affect the validity of the insurance. *Bailey v. Insurance Co.*, 13 Fed. 250, 1 McCrary, 221; *Esch v. Insurance Co.*, 78 Iowa, 334, 43 N. W. 229; *Lockwood v. Assurance Co.*, 47 Conn. 553.

³⁵ 158 Ill. 149, 41 N. E. 854; *Dadmun Manuf'g Co. v. Worcester Mut. Fire Ins. Co.*, 11 Metc. (Mass.) 429; *Young v. Insurance Co.*, 14 Graff, 150; *Perry v. Insurance Co.*, 61 N. Y. 214.

³⁶ 86 Ala. 189, 5 South. 500; *Lasher v. Insurance Co.*, 86 N. Y. 423; *Mers v. Insurance Co.*, 68 Mo. 127; *Swan v. Insurance Co.*, 96 Pa. St. 37; *Adema v. Insurance Co.*, 36 La. Ana. 660; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 2 South. 125.

chase money at the time of the issuance of the policy, and that he had no other title to the property. The policy provided, among other things, as follows: "This policy shall become void unless consent in writing is indorsed by the company thereon in each of the following instances, namely, if the assured is not the sole and unconditional owner of the property, or if any building intended to be insured stands on ground not owned in fee simple by the assured, or if the interest of the assured in the property as owner, trustee, consignee, factor or agent, mortgagee, lessee, or otherwise is not truly stated in the policy." The plaintiff in this action was the assignee of the insured, one Sage. The court said: "The object of such stipulation in the policy is to protect the company against taking risks on property for an amount disproportionate to the value of the interest of the assured, on which the company relies to a great extent as an incentive to use all reasonable precautions to avoid the destruction of the property. Being incorporated in the policy, it is in the nature of a condition precedent, which must be substantially conformed with to entitle the assured to recover. When the true ownership is not required to be stated by the conditions of the policy, generally it will be sufficient if the insured has an insurable interest; but, when such requirement is the condition of the policy, it becomes a material part of the contract, and all rights under it are forfeited by noncompliance. A failure in such case to disclose truly the interest in the property cannot be regarded an immaterial circumstance. By express stipulations, the parties made it material, and the validity of the contract depended upon the compliance with the condition. The assured, by accepting a policy in which such condition is incorporated, becomes bound thereby; and, when he claims to enforce the contract and receive its benefits, he is estopped from denying his assent to the stipulation. The court further said: "The plea clearly shows that the assured was not the sole and unconditional owner; that he did not own in fee simple the ground on which the building stood; that his interest in the property was not truly stated,—and noncompliance with the condition and stipulation of the policy will avoid the contract."

§ 67. The Contract will be Construed with Reference to the Character and Situation of the Property Insured.

A contract of insurance will be presumed to have been made in reference to the character of the property or business to which it relates, and to afford the protection which it promises. Thus, while, by certain of its provisions, it is to become void if any portion of the property insured is sold, or any change takes place in title or possession, this prohibition will not be construed as intended to restrain the merchant or manufacturer from buying and selling in the ordinary course of business, and so, too, may the farmer dispose of his products for an entire season. His hay, grain, and even the live stock mentioned in the policy may be sold without an avoidance; and, when the new crops are gathered into the barns and cribs, they have the same protection as the property in possession at the time the insurance was effected. Thus, it will be seen that a plain stipulation in the contract will be rendered nugatory by construction, and for the obvious reason that it is inapplicable to the circumstances presented, and inconsistent with the evident purpose of the parties. It cannot be supposed that it was in contemplation, when the policy was written, that the merchant and the manufacturer were to close their stores and their workshops: or that the farmer, accepting a policy for a term of three or five years, understood that only a single crop was insured, and that, when a sale was made of an ox or a crib of corn, his insurance was forfeited. The contract of insurance is in some important respects "*sui generis*." It has been framed to suit, with slightly modifying clauses, every class of property under the widely differing circumstances in which it is used and located. From the necessities of the case, there will often be a want of adaptation, and the fixed and rigid terms of the policy, when this occurs, must be bent by the judicial arm to serve, and not to defeat, the intention of the parties. In several of the states the form of the insurance policy is statutory, and it is inconceivable that the wisdom of the legislator or the wisdom of the underwriter can have provided in advance an inelastic form of words by which can be given a definite expression, under a great variety of circumstances, of the understandings and agreements of the insured and the insurer. From this necessity of

adapting a general form to particular conditions, there will often be obscurities and contention, and the courts will be called to interpret and construe; and this will be, and should be, always performed in such a manner as to prevent forfeitures, whenever it can be done without doing violence to any plain contract stipulations. The courts must act on the reasonable presumption that, in consideration of the premium, some form and manner of protection was contemplated, and the contract will be understood and construed as having been made for such a purpose.

In *Cummings v. Cheshire Co. M. F. Ins. Co.*,³⁷ a dwelling house and contents were insured in specific sums. The dwelling was sold to the plaintiff, and the entire policy assigned to him, with the consent of the defendant. The household goods, insured to the original party, were removed to another place. The dwelling insured and its contents having been burned, the defendant claimed that it was not liable for the household goods, as the insurance applied only to the furniture and wearing apparel contained in the dwelling when insured, and, as these particular goods had suffered no damage, the company could not be charged; but the court held that, the contract being personal, the goods of the assignee were protected in the same manner and to the same extent as were those of the original insured.³⁸ Conditions which influence the judgment and action of the

³⁷ 55 N. H. 447.

³⁸ A harvesting machine was described in the policy as "operating in grain fields, and in transit from place to place in connection with harvesting in Fresno Co." At the time of the fire the harvesting season had closed, and the machine was not in grain fields, nor in transit from place to place. Held, that the insurer was not liable. *Benicia Agricultural Works v. Germania Ins. Co.*, 97 Cal. 468, 32 Pac. 512; *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444; *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475.

The policy covered a threshing machine when "not in use." It had been operated about two weeks, and was at a repair shop when loss occurred. It was held that the words "in use" meant actually in operation. *Minneapolis Threshing Mach. Co. v. Firemen's Ins. Co.*, 57 Minn. 35, 58 N. W. 819.

A policy was written to cover, in specific sums, seven different subjects. A new building was subsequently erected 15 feet away, and the policy was indorsed to cover the new structure. The court held that none of the insurance applied to the new building, as the entire insurance was exhausted in paying the losses as originally apportioned; but did not explain why the first apportionment of the insurance should be regarded, and the last treated

parties prior to a loss must receive a fair construction,—one that will express as near as possible the intentions of the insurer and insured. Conditions that relate to matters after a loss, if doubt and ambiguity exist, will be construed most favorably to the insured.

§ 68. A Change from Ownership to Life Estate Voids the Policy.

A. sold to B. the land on which the insured property was located. This sale was confirmed by good and sufficient deed. As a part of the consideration, A. received back from B. a bond, made in conformity with the statutes, which secured to A. the use and occupancy of the property during his life. Thus, his estate in fee was changed to one for life. This sale was made without the knowledge of the insurer. The policy contained a clause that it should be void if there were any sale, transfer, or change of title without the consent of the company. It was held that the company was not liable.³⁹

§ 69. Insurance without an Interest in the Property is Contrary to Public Policy.

In *Agricultural Ins. Co. v. Montague*,⁴⁰ the policy insured, among other things, an organ and certain articles of silverware. The first of these was purchased on credit, and with the understanding that the

as a nullity. We agree with the court that the indorsement to extend the insurance to the new subject could not be given effect, because there had been a failure to specify the changes to be made, or, in other words, to provide a new apportionment. *Nappanee Furniture Co. v. Vernon Ins. Co.*, 10 Ind. App. 319, 37 N. E. 1064.

Courts may construe, but cannot change, contracts. *Dover Glass Works v. American Fire Ins. Co.* (Del.) 29 Atl. 1039; *Tubb v. Insurance Co.* (Ala.) 17 South. 615; *East Texas Fire Ins. Co. v. Kempner* (Tex. Civ. App.) 34 S. W. 393; *Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110.

Policy insured "farming implements." Held, that binding twine was covered. *Davis v. Insurance Co.* (Iowa) 64 N. W. 687; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 173 Pa. St. 53, 34 Atl. 16.

³⁹ *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608.

⁴⁰ 38 Mich. 548, 7 Ins. Law J. 708.

title was not to pass until the organ was paid for. This had not been done when the fire occurred. The policy, by its terms, required a full disclosure of title; and, if any other person was interested in the property, the fact was to be stated, and, failing to make such disclosures of title and interest, the policy would be void. The policy was issued to one Graves, and assigned to Montague, the defendant in error. The court held that, while Graves had an equitable interest in the organ, he did not own it, and his neglect to inform the insurer of the state of the title was fatal to recovery.⁴¹

The silverware insured, it was in proof, belonged to Graves' wife; but it was alleged and shown that the facts in regard to ownership were fully explained to the agent who wrote the policy, previous to his doing so. It was claimed that, the company having such knowledge when issuing the policy, its technical defense, on account of the ownership of the property being in another, was waived. The trial judge took this view of the matter in his instructions to the jury. Justice Cooley, of the supreme court, said: "If the instruction was correct, it is manifest that any person may obtain insurance upon property without any right to it whatsoever. He has but to disclose the facts, and the policy, though only a wager policy, will be as legal as any other; but such doctrine is at war with the fundamental principles of insurance, which require that a person shall have an insurable interest before he can insure. A policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge. The policy of the law does not admit of such insurance, however willing the parties may be to enter into it. The doctrine of waiver has obviously nothing to do with such a case. The agent cannot do for the company by waiver what the company is powerless by express contract to do for itself. He cannot by waiver invest the insured with an interest he does not own. There was occasion to consider this question in *Peoria Marine & Fire Ins. Co. v. Hall*,⁴² and it was there held that an insurance of partnership property by one person in his own name could not be made to embrace the interest of the other partner, notwithstanding it was written by the agent with full knowledge of the facts. The reason is the one above assigned,—it is not competent to write an insurance where an insurable interest

⁴¹ See authorities cited in notes 34 and 36, ante.

⁴² 12 Mich. 202.

is wanting, whether the facts are known or not. The difficulty is inherent in the case, and is beyond the reach of waiver."⁴³ The court then adds, as a basis for the principal proposition: "Under our statute, the husband has no control whatever over his wife's property, so that the question arises here precisely as it would had the silver been owned by a stranger."

Under the insurance contract now in general use, the question will seldom arise whether the insured has or has not an insurable interest. The underwriter will in most cases be reluctant to approve risks where there are no better guaranties of care and protection than such as are offered by persons whose interests are qualified, unsettled, and frequently the subject of dispute. Something more is required as the basis of confidence, as a pledge of permanence, as a promise that the insurer shall not become involved in doubtful controversies, and made to bear the misfortunes of an unsuccessful contest to establish a legal right. The importance of this matter is now so well understood that it will not often occur that indemnity will be promised to persons whose interests are less than absolute ownership.

§ 70. Real-Estate Mortgage is not a Change of Title.

A real-estate mortgage is not a change of title, although it has been held to be an alienation of ownership and a change of interest.⁴⁴ In that case the policy prohibited an "alienation of ownership," and, the property having subsequently become mortgaged, a forfeiture was held.

⁴³ "At the common law, as well as under the statute of New York against betting and gaming, a policy of fire insurance is void unless the party insured has at the time an insurable interest in the property." *Freeman v. Insurance Co.*, 38 Barb. 247, 14 Abb. Prac. (N. Y.) 398; *Murdock v. Insurance Co.*, 2 N. Y. 210; *Tallman v. Insurance Co.*, 29 How. Prac. (N. Y.) 71; *Home Ins. Co. v. Duke*, 75 Ind. 535, 10 Ins. Law J. 857; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132, 11 Ins. Law J. 634; *Baldwin v. Insurance Co.*, 60 Iowa, 497, 15 N. W. 300, and 12 Ins. Law J. 371; *Williams v. Insurance Co.*, 24 Fed. 625, 14 Ins. Law J. 708; *Chrisman v. Insurance Co.*, 16 Or. 283, 18 Pac. 466; *Monroe v. Insurance Co.*, 63 Ga. 669.

⁴⁴ *Edmonds v. Insurance Co.*, 1 Allen (Mass.) 311.

In *Gaskin v. Phoenix Ins. Co.*,⁴⁵ the interest of the mortgagee having been changed to that of absolute ownership by foreclosure, and the policy providing for a forfeiture in case there should be a "change in title or possession," the court held that there was an avoidance.

§ 71. Incumbrance.

Where the policy only stipulates against alienation or change of title, incumbrance will not ordinarily render it invalid. We have seen in the course of our inquiries that personal mortgages have been held to so affect the hazard as to discharge the insurer, under a provision of the policy that it shall become void if the risk shall in any manner be increased without the consent of the company;⁴⁶ and

⁴⁵ 2 Allen (N. B.) 429.

⁴⁶ *Lee v. Insurance Co.*, 79 Iowa, 379, 44 N. W. 683, and 19 Ins. Law J. 551; *Appleton Iron Co. v. British America Assur. Co.*, 46 Wis. 23, 50 N. W. 1100.

The courts have differed widely in their conclusions as to the ownership of mortgaged chattels. Where there had been no change in the possession of the property, it was held in the following cases that the title did not rest in the mortgagee: *Hanover Fire Ins. Co. v. Connor*, 20 Ill. App. 297; *Rice v. Tower*, 1 Gray (Mass.) 426; *Hennessey v. Insurance Co.*, 28 Hun (N. Y.) 98; *Taylor v. Insurance Co.*, 83 Iowa, 402, 49 N. W. 994; *Van Deusen v. Insurance Co.*, 1 Abb. Prac. (N. S.; N. Y.) 349.

In case last cited the court declared the rule that, where mortgagor of chattels continues to have both possession and the right of possession, there is no alienation. *Hubbard v. Insurance Co.*, 33 Iowa 325; *Hicks v. Insurance Co.*, 71 Iowa, 119, 32 N. W. 201.

Chattel mortgage is an increase of the risk. In *Lee v. Insurance Co.*, 79 Iowa, 379, 44 N. W. 683, it was held, as a matter of law, that a chattel mortgage relieved the insurer, under a condition of its policy that if the risk be increased without its consent the policy should be void. The court said: "The giving of a chattel mortgage is, beyond question, an increase of the risk, and a decrease of the defendant's security, because thereby the assured lessened his interest in the insured property. It makes no difference that a right of action had not accrued upon the mortgage. It was a depletion of the assured's interest in the property, to the extent thereof, from its execution and delivery." When personal property is mortgaged, and continues in the possession of the mortgagor, it may be doubted whether the insurer will be relieved under a policy inhibiting, by its terms, on penalty of forfeiture, any "change of title." See, also, as fully sustaining this decision, *Woodward v. Insurance Co.*, 32 Hun, 365.

This was held in *Tallman v. Insurance Co.*, *42 N. Y. 87. But when the

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circumstances may sometimes arise in connection with real-estate mortgages where it will be a proper question to submit to a jury whether the incumbrance had not affected the hazard to such an extent as to prejudice the right of the insurer. In Massachusetts it has been held that, when the policy prohibits an "alteration in the property" under penalty of forfeiture, a mortgage will prevent recovery.⁴⁷

Elsewhere real-estate mortgages have not been held to affect the validity of the insurance, unless it is so stipulated in the policy. When, in suitable form of words, it is made a condition that incumbrances must be disclosed and consented to by the insurer, it has been held by the courts, with great unanimity, that there must be compliance, or there will be no liability. And it may be said, too, that there is a consensus of judgment that, when the mortgagor of chattels has both the possession and the right of possession, no alienation has resulted by placing the mortgage.

The insured represented that the property covered was incumbered for about \$3,000. The incumbrances were shown to exceed \$4,400, and it was held that the misrepresentation was fatal to recovery. This ruling appears to have been without regard to any question of good faith on the part of the insured.⁴⁸

In *Farmers' & Drovers' Ins. Co. v. Curry*,⁴⁹ the insured had warranted that he was the sole and unconditional owner; but, it appearing that there was a vendor's lien for the unpaid purchase money, it was held that the policy was void.

In *Sentell v. Oswego County Farmers' Ins. Co.*,⁵⁰ at the time of making application the agent was informed by the applicant that he intended placing a mortgage on the property to the amount of \$1,000;

possession of the property has passed to the mortgagee the case is otherwise. The title is then changed, the sale is completed, and even while the property remains in the possession of the mortgagor the effect of a chattel mortgage would be to render invalid a policy providing for forfeiture in case there should be any "change of interest." If the mortgagor still continues, in law, the owner, it cannot be disputed that his interest in the property has become materially diminished.

⁴⁷ *Edmonds v. Insurance Co.*, 1 Allen (Mass.) 311; *Hutchins v. Insurance Co.*, 11 Ohio St. 477.

⁴⁸ *Glade v. Insurance Co.*, 56 Iowa, 400, 9 N. W. 320.

⁴⁹ 13 Bush (Ky.) 312.

⁵⁰ 16 Hun (N. Y.) 516.

and thereupon the agent filled up the application so as to represent an existing incumbrance for the sum mentioned. Subsequently, the premises were mortgaged for \$1,200. The policy prohibited any increase of incumbrances without notice and consent. It was held that the covenant had been violated, and the insurer was released.

A mortgage was held by the supreme court of North Carolina to be an alienation, within the terms of the policy, which provided that if the property insured should be alienated, or in case there was any transfer or change of title, without consent, the policy should be void. The insured having executed a mortgage on the property, with power of sale, the court held there was an avoidance.⁵¹

It was held in Texas that a real-estate mortgage was a change of interest;⁵² and in North Carolina that the execution and delivery of a mortgage, with power of sale, was a change of title and interest.⁵³ While the owner of real estate is no less an owner, in legal effect, after placing a mortgage on the property, than he was before, it will not be disputed that his interest is frequently diminished exactly in proportion as the incumbrance is increased; and it is this fact, which refers directly to the moral hazard of the risk, that chiefly concerns the insurer; and hence, too, in most cases a disclosure of incumbrances and title is made a condition to the payment of a loss. When its uses are understood, the required representations concerning the insured's interest in the property are justified by business considerations, and have the sanction of the courts.

§ 72. A Person Holding a Contract of Sale in Possession is Sole and Unconditional Owner.

This proposition is aptly illustrated in the case of *Cottingham v. Firemen's Fund Ins. Co.*⁵⁴ At the time the policy in that suit was issued, plaintiff owned the property insured, but, before the loss, entered into the following contract of sale: "This contract witness-

⁵¹ *Sossaman v. Insurance Co.*, 78 N. C. 145; *Byers v. Insurance Co.*, 35 Ohio St. 606; *Ellis v. Insurance Co.*, 61 Iowa, 577, 16 N. W. 744; *Mallory v. Insurance Co.*, 65 Iowa, 450, 21 N. W. 772; *O'Brien v. Insurance Co.*, 79 Wis. 399, 48 N. W. 714; *Hankins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34.

⁵² *East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23, 15 S. W. 166.

⁵³ *Sossaman v. Insurance Co.*, 78 N. C. 145. ⁵⁴ 90 Ky. 439, 14 S. W. 417.

eth that we, C. H. and H. A. King, have this day swapped or exchanged property with Albert Cottingham, as follows: We, C. H. and H. A. King, give Cottingham the G. H. Cottingham house and lot for the Albert Cottingham house and lot, formerly owned by James A. Watson, and the lot west of the house. * * * Deeds to be made soon. [Signed] C. H. and H. A. King. A. G. Cottingham." The policy provided that it should be void if, without written permission, the property should be sold or transferred, or if any change should take place in title or possession. The court said: "In this state the purchaser of real estate by title bond takes the risk of the property. He is the beneficial owner of it, and its loss or destruction falls upon him, and not on the vendor.⁵⁵ It is the vendor's parting with the beneficial interest in the property that affects his contract of insurance; and, where a sale of the legal title is to deprive the owner of such interest, a sale of the equitable title only will not be sufficient for the purpose. But where, as in this state, the beneficial interest is passed to the vendee of the equitable title, the contract of insurance is affected by such sale. The vendee in such case assumes all risk of loss or destruction of the property. Such risk is no longer with the vendor; hence the insured's contract of indemnity against the destruction or damage of the insured property is at an end."

Where the policy contains a condition that it shall be void unless the insured is the sole and unconditional owner of the property insured, it has been held in several of the states that the company is not relieved from payment of loss, although it is shown that the insured, being in possession, holds only a contract of purchase.⁵⁶

It was represented in *Pelton v. Westchester Fire Ins. Co.*⁵⁷ that the insured owned the property. The policy stipulation was that it should be void if assured had not the entire, unconditional, and sole ownership, unless otherwise expressed. He was in possession under a contract of sale by the owner of the fee. It was a provision of that contract that the owner might declare a forfeiture should the vendee default in payment. It was also shown that a default actually existed at the time the insurance was effected. The vendor had not

⁵⁵ *Marks v. Tichenor* (Ky.) 4 S. W. 225; *Calhoon v. Belden*, 3 Bush (Ky.) 674.

⁵⁶ *Martin v. Insurance Co.*, 44 N. J. Law, 485; *Pelton v. Insurance Co.*, 77 N. Y. 605, 13 Hun, 23.

⁵⁷ *Supra.*

insisted on his right to declare a forfeiture when the loss occurred. It was held that the representation of the assured that he was the owner was not untrue, and that the insurer was liable.

In *East Texas Fire Ins. Co. v. Dyches*,⁵⁸ the test was suggested by the court that, if the insured could enforce specific performance of a bond given to convey the property, then he was in fact the owner in fee simple.

Where the insured was in possession under a contract of sale from the owner in fee, and had paid the entire purchase price, but had not yet received a deed, it was held ⁵⁹ that he was the sole, unconditional, and fee-simple owner.

In *Parsons on Mercantile Law*,⁶⁰ he states this proposition: "Every actual sale is an executed contract, although payment or delivery may remain to be made."

And in *De Ridder v. McKnight*,⁶¹ the court said: "A sale is not so much a contract for the transfer of property as it is the actual transfer of the right to property, and this right passes as soon as the parties have agreed to the terms and conditions of the sale; for, when the contracting parties clearly manifest their assent to a sale, the law immediately carries the intention into effect, and transfers the right of property from the one to the other." The meaning of this would seem to be that the right of property can be transferred by the agreement of parties, and that the change of physical possession is important only as a visible and substantial evidence of assent and purpose. The law will recognize other evidence that is sufficiently strong to overcome the presumptions in favor of possession.

Again, we quote from *Parsons*:⁶² "A contract is made. when the agreement is made that the completion of the sale does not depend upon the delivery of the goods by the seller, nor upon the payment of the price by the buyer; that, by the assent of the parties to the terms of the sale, the buyer acquires at once the property, and all the rights and liabilities of the property; and that, in case of loss or depreciation of the articles purchased, the buyer will be the sufferer, as he will be the gainer by any increase of the value." But he says: "A

⁵⁸ 56 Tex. 565.

⁵⁹ *Lewis v. Insurance Co.*, 29 Fed. 496; *Brogan v. Insurance Co.*, 29 U. C. C. P. 414; *Gill v. Insurance Co.*, 1 Ont. 341.

⁶⁰ 2d Ed.

⁶¹ 13 Johns. (N. Y.) 294.

⁶² 2d Ed.

delay in the delivery of goods or of payment of the same if anything remains to be done by the seller to or in relation to the goods sold for their ascertainment, identification, or completion, the property in the goods does not pass until that thing is done, and there is yet no completed sale. Therefore, if there be a bargain for the sale of specific goods, but there remains something material which the seller has to do to them, and they are casually burned or stolen, the loss is the seller's, because the property has not passed to the buyer."

§ 73. Holding under a Contract of Sale not Unqualified Ownership.

In *Smith v. Bowditch Mut. Fire Ins. Co.*,⁶³ the by-laws of the company required all applicants to state truly their title and interest in the property to be insured, and, on failure to do so, it was provided that the company would not be bound. The applicant described the premises as his, without stating anything specific in regard to his title. On the trial, it was shown that he held under a contract of sale. The court held that "the failure to express the true title of the assured, although not interrogated as to it, rendered the policy void."⁶⁴

While this decision is supported by many excellent authorities, and declares what we believe to be the correct rule of law, there are, nevertheless, courts of eminent learning that have held otherwise, as we have elsewhere pointed out. The statement of the applicant that the property was his was no doubt a truthful one, but the by-laws required by fair implication that he should disclose other facts that were withheld. The applicant was, it is true, the owner of the property; but the fact that the legal title was in another was important to the insurer, and in good faith should not have been concealed. The by-laws called for information in regard to title as well as interest, and for excellent reasons. While a person holding under a contract of purchase is, in a legal sense, the owner, that ownership is always in fact qualified, and his real interest may often be small in proportion to the value of the property. Suppose, for illustration, A. sells to B. a farm valued at

⁶³ 6 Cush. (Mass.) 448.

⁶⁴ *Kibbe v. Insurance Co.*, 11 Gray (Mass.) 163; *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.) 415.

\$10,000, receiving a cash payment of \$500. The deferred payments of \$9,500 are to be made in sums of \$500 each at intervals of six months, until the whole amount is paid. A. enters into a contract, with proper covenants, to deliver to B. a good and sufficient deed of the property when paid for as above stated. B. now procures an insurance on the farm buildings, describing them as "his," for \$5,000. When this is done, it is easy to understand that a dangerous temptation is put before B. to burn the property, and subsequently abandon the farm to A., who, as well as the insurer, has been wronged by the transaction. It is seen, therefore, that the insurance company must for its own protection, and for the protection of public morality, require of those seeking insurance the fullest disclosure in regard to their title and interest in the property to be insured.

§ 74. When There is a Change of Title without a Sale.

We have frequently pointed out during the progress of this discussion that there may be a valid sale without a transfer of the legal title, and so, too, it will appear that there may be a transfer of the legal title without an actual sale.

In *Western Massachusetts Ins. Co. v. Ricker*,⁶⁵ after the insurance was effected, and before the loss, the defendant in error conveyed to one Latourette an undivided one-third interest in the property insured. The policy provided for an avoidance in the case of any change in title or ownership without notice and consent. The trial court admitted parol testimony to show that the conveyance referred to was intended and understood between the parties as security for money loaned and for advances to be made defendant Ricker. The supreme court held this to be error. It is said: "There may be a transfer or change of title without sale. The words 'transfer or change of title' are more comprehensive than the word 'sale.' Should A. convey a piece of property to B., to be held in secured trust for him, there would be a transfer or change of title from A. to B. It would not be a sale of the property or an actual parting with it for valuable consideration, although the conveyance on its face would import a sale by A. to B. If the trust, instead of being secured, appeared on the face

⁶⁵ 10 Mich. 279.

of the conveyance, there would still be a change of title. The title would no longer be in A., but in B., his grantee. We think such a conveyance would clearly come within the condition of the policy, and put an end to the insurance. If such a conveyance would annul the policy, we see no reason why the conveyance to L. should not have that effect. The title to one-third of the mill was in him, and not in the insured, when the fire occurred. There can be no doubt that the deed being absolute on its face, and not in form a mortgage, placed the title in L. He could have sold the property, and conveyed a good title to his vendee, if the latter was ignorant of the circumstances under which he acquired the title. But it is insisted that the conveyance does not affect the insurance on the other two-thirds of the mill. * * * The mill was an entirety, and insured as such. The title was changed, not the whole title, but a part of it. The whole title was in the insured at the date of the policy. When the fire took place, two-thirds of the title only was in them, and one-third in L. This is a change of title to the entirety of the thing insured.”⁶⁶

§ 75. Sale by Joint Owner of an Undivided Interest Voids the Policy.

In *Dix v. Mercantile Ins. Co.*,⁶⁷ the insurance was obtained by Sinclair, Dix, and Harris, who were joint owners of the property insured. Subsequently, and before the loss, Sinclair sold his undivided interest to the other partners, Dix and Harris. The policy expressed a condition as follows: “In case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease.” The court said: “Here was a transfer by one of the insured to the other of his undivided interest in the property insured. There is a change of title to an undivided interest in the property. At the date of the policy, it belonged to Sinclair. At the time of the loss, it was the property of Dix and Harris. * * * The intention of the company was manifestly, as urged, that no stranger should come into the management and care of the property without their consent. Knowing the parties with

⁶⁶ *Brown v. Insurance Co.*, 156 Mass. 587, 31 N. E. 691; *Dreher v. Insurance Co.*, 18 Mo. 128; *Dix v. Insurance Co.*, 22 Ill. 272.

⁶⁷ 22 Ill. 272.

whom they were contracting, relying upon the fidelity and circumspection of each and every one of them, they were willing to take the risk at the premium stipulated. It was an object of the first importance with them to secure for the property the guardianship and care of faithful and trustworthy men, and for this they were willing, for the premium, to intrust the property to the care of Sinclair, Dix, and Harris, but not to the care of Dix and Harris alone. Is it not plain that the insured may be as greatly prejudiced by removing one to whom, with others, they had trusted the guardianship of valuable property, as by the introduction of a stranger? The one removing from the concern may have been the very one in whose vigilance, fidelity, and care the greatest share of confidence was reposed; and, by so removing, the hazard is increased to the assured without any corresponding increase of premium. This is neither just nor equitable. The plaintiffs, therefore, have no right to say that it was against the coming in of strangers the condition was aimed."⁶⁸

In *Hartford Fire Ins. Co. v. Ross*,⁶⁹ the policy was issued to Ross, Shirk, and Logan, who were doing business as partners. Before the loss occurred, Logan sold his interest to Shirk, without notice to or the consent of the insurer. The policy provided against alienation or change of title in the same manner as in *Dix v. Mercantile Ins. Co.*,⁷⁰ and the court, referring to the opinion then written, fully adopted the conclusions reached and views expressed by the Illinois court.

§ 76. Partition of the Property Insured is a Change of Title and Interest.

So, also, where the insurance is for one who owns real estate in common with another, and the policy covers on his undivided interest, and, before loss, a partition of the property is had, such change has taken place in title and interest as will render invalid a policy which provides that it shall be void if any alteration or change occurs in the title. This was held in *Barnes v. Union Mut. Fire Ins. Co.*⁷¹ We quote

⁶⁸ *Howard v. Insurance Co.*, 3 Denio, 301; *Murdock v. Insurance Co.*, 2 N. Y. 210.

⁶⁹ 23 Ind. 179.

⁷⁰ 22 Ill. 272.

⁷¹ 51 Me. 110; *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848.

from the opinion: "The partition of the property may not have been an alienation, as understood in matters of insurance; but, when a by-law provides that any alteration or change in the title shall make the policy void, any material change in the title will have that effect, though it is not by alienation. The title in the case at bar was materially changed by the partition. The effect was equivalent to an alienation and a purchase. The plaintiff no longer owned any interest in the entire property, while he did own the entire interest in a part of it. The title no longer corresponded with the policy in nature or quantity. He insured but one undivided half of the part which he owned after it was divided, and after the division he owned no part of the other half. If he could recover at all, which he cannot do, it would be for only one-fourth part of the whole, or for an undivided half of the part which he continued to own after the partition."

§ 77. Change of Title by Death will Void the Policy Unless Otherwise Provided.

Where the policy provides that it will become void when any change takes place in title or possession, on the death of the insured the liability of the company will immediately terminate. Whether the same consequences would result if the policy expressed no condition in regard to change of title is, so far as our inquiry has extended, an open question. There are, however, excellent reasons to support so extreme a proposition, proceeding from the purely personal character of the insurance contract. It is the person, and not the property, that is insured. The engagement, too, is one involving mutual obligations. The company's promise of indemnity is to a particular individual, and made contingent on the performance by him of certain important and specified duties. His personal character, business habits, and reputation are always considerations in estimating the value and desirability of a hazard. When the insured dies, there remain none of the guaranties which were based upon his integrity and watchful habits, and which perhaps alone induced the company to accept the risk. It is left for a stranger to perform in good faith or to neglect with indifference the protection of the property,—a matter always of the first importance to the insurer. The heirs or personal representatives of the deceased, who assume the care and custody of the

property, may be persons deficient in moral character or intelligence, incompetent to be charged with important responsibilities, or unsafe persons to insure on account of reckless and dissipated habits. So far as we know, the courts have never passed directly on this question; but, for the reasons here stated, we favor the opinion that, in the absence of any provisions contained in the contract continuing its benefits to heirs or personal representatives of the insured, it would terminate at his death.

In *Lappin v. Charter Oak Fire & Marine Ins. Co.*,⁷² it was a provision of the policy that any loss for which the company was liable would be paid to the assured, his executors, administrators, and assigns. It also provided that if there should be any sale, transfer, or change of title in the property insured, or of any interest therein, without the consent of the company, the policy should cease and become void; and the court held that the insurance did cease and become of no binding force on the death of the insured; that the vesting of the title in his heirs at law was a change from the insured to others, within the express terms of the policy.

In *Hine v. Woolworth*,⁷³ the policy was issued by the Homestead Fire Insurance Company to one Bramillet, who subsequently died. The policy expressed a condition that it would become invalid if the interest of the assured should be changed in any manner without the consent of the company. The policy also provided that any loss within its terms should be paid to the assured, his executors, administrators, and assigns. In its discussion of the case, the New York court of appeals said: "It did not by its terms insure the heirs, executors, administrators, and assigns against loss by fire, but merely insured Bramillet, and then promised to pay such insurance to him, his heirs, executors, administrators, and assigns. He might suffer a loss in his lifetime, and then die, and the loss would be payable to the executors or administrators; or he might suffer loss, then assign it, and then it would be payable to his assigns. The word 'heirs' is in the same connection with the words 'executors, administrators, and assigns'; and the language imported a covenant to pay them, and, in case the estate was so situated that they would become entitled to the payment of the loss, would be payable to them, but there was no

⁷² 58 Barb. 325.

⁷³ 93 N. Y. 75, 13 Ins. Law J. 71.

insurance for their protection. In order to hold that it was an insurance for the benefit of the heirs, we should also have to hold that it was an insurance for the benefit of the executors, administrators, and assigns, and the latter term would embrace any person to whom the insured might convey his property. Such, clearly, was not the intention of the policy. Therefore, when Bramillet died, and the title to the property was transferred to his heirs, there was such a change in the interest as avoided the policy until the consent of the company should be obtained." *Wyman v. Wyman*⁷⁴ fully sustains the doctrine here stated.

Many policies provide that a change of title or interest shall not cause an avoidance when the change is the result of a "succession by reason of death." It may be doubted whether the language of this qualifying clause would be sufficient to continue the insurance except to heirs and administrators. Webster defines the word "succession" as "the right to enter upon the possession of property of an ancestor or one near of kin, or proceeding in an established order"; and this we understand to be the meaning of the word in law.⁷⁵ When the insured property, therefore, does not descend to the heir in the manner provided by law, but is disposed of by will, a change has taken place that will render the policy invalid.

In *Quarles v. Clayton*,⁷⁶ is found an interesting discussion in regard to the personal character of the insurance contract, and under what circumstances the obligation of the insurer will not survive the death of the insured. The policy was issued to John W. Quarles, and contained the usual stipulations against alienation, etc. In the marriage contract between Quarles and Mrs. Nancy M. Kirk, who subsequently became his wife, and was such at the time of his death, it was provided that the wife should acquire no legal interest on account of the marriage relations in any of the property of the husband, and that, in case he died without making other provision for her, she should have the use of 140 acres of land, on which were situated the home and other outbuildings. Quarles died intestate, and before the metes and bounds of the 140 acres of land which she was to receive in lieu

⁷⁴ 26 N. Y. 253.

⁷⁵ *Hunt v. Hunt*, 37 Me. 344; *Blake v. McCartney*, 4 Cliff. 103, Fed. Cas. No. 1,498.

⁷⁶ 87 Tenn. 308, 10 S. W. 505.

of her dower interest, under the marriage contract, had been fixed, the home mansion burned; and the question presented to the court was whether Mrs. Quarles was entitled to the benefit of the insurance which had been obtained by her husband in his lifetime, and which continued on the property up to the time of the fire. The policy provided that it should become void in case any change should take place in the title or possession, except by succession by reason of the death of the assured. The court said: "These provisions have been upheld by the courts as reasonable conditions, limiting and restricting the liability of the assured. That they are reasonable is obvious, when we consider that the contract is one for the personal indemnity of the assured against a loss, affecting his interest in the property covered by the policy. The insurer contracts with reference to the character of the assured for integrity and prudence. He might be very willing to agree to make good the loss of one by the destruction of property owned by him, while he would be altogether unwilling to insure the same property if owned by another. Again, the contract undertakes to make good any loss which the assured may sustain, and from this it follows that, if the assured has parted with his interest before the loss, he cannot ask to be indemnified, because he has sustained no loss. The provision against the change of title is, therefore, in precise harmony with the personal character of the contract. In some fire insurance contracts the stipulation against change of title extends so far as to make the policy void, should such change of title be brought about by the death of the assured. The title in such case is no longer in the assured, but has, by law, passed to his heirs, or by will to his devisees; and a change of title so occurring has been held to defeat an action for a loss occurring after the death of the assured.⁷⁷ The contract is not, therefore, one which attaches to or follows the property, being one for the personal indemnity of the assured; and, where the insurer does not assent to the assignment of the policy to a grantee of the property, neither the assured nor his assignee of the property can recover upon the policy."⁷⁸

The court then makes the distinction between the policy in suit and those in the cases above referred to in the New York court, in respect

⁷⁷ *Sherwood v. Insurance Co.*, 73 N. Y. 447; *Hine v. Woolworth*, 93 N. Y. 75.

⁷⁸ *Hobbs v. Insurance Co.*, 1 Sneed (Tenn.) 445.

to the fact that the policy issued to Mr. Quarles made an exception, when providing against change of interest and alienation, that any change by succession on account of the death of the insured should not work a forfeiture. It said: "The legal effect of this exception is to continue and extend the policy, notwithstanding the change of title by the death of the assured." The court then further explains that appellant takes whatever interest she has in the property under the fire policy by virtue of her marriage contract, and not by succession; that she was entitled to the homestead dower because she had expressly agreed to take it in lieu of all right which the law would have given her under the provisions of the marriage contract. This interest, the court said, was a contingent one, depending upon two events: "First, that she should survive her husband; and, second, that he should not by deed or will make any other provision for her. Both of these events occurred, and, instantly upon the death of her husband, she became seised of an estate for her life in the insured premises. She therefore took this mansion house as the grantee of her husband, and did not take it by succession. * * * But it is insisted that, however she acquired the estate, she has an equitable interest in a life estate in this fund, because it represents the premises which she had a right to occupy and enjoy during her life. This presents a strong case in morals, but her legal rights are not so clear. The rule is well settled that no equity attaches upon the proceeds of a fire policy in favor of third persons who, in the character of grantee, mortgagee, or creditor, may have sustained loss, in the absence of some trust or contract to that effect.⁷⁹ This rule applies as well to vendors and lienors of every class as to mortgagees who may have had their security impaired by a loss by fire. This court, in a well-considered case, held that the holder of a mechanic's lien upon a building had no equitable lien in a fire policy effected by the owner and assigned to a mortgagee.⁸⁰ * * * The agreed state of facts upon which this case is submitted fails to show any covenant, contract, agreement, or understanding with Mr. Quarles, who insured this property for the benefit of appellant. The interest of the appellant after the death of her husband was an insurable one; so was the remainder interest of the heirs. The decedent having left no debts, and the

⁷⁹ May, Ins. § 456; 3 Kent, Comm. (10th Ed.) 499.

⁸⁰ Galyon v. Ketchen, 85 Tenn. 55, 1 S. W. 508.

distributees being the same persons who took the real estate as heirs, no controversy arises as between the administrator and the remainder-men. * * * There is no privity between appellant and the insurer, and no action of his can be ground to give her an interest which she would not otherwise have."

The supreme court of Michigan, in *Westchester Fire Ins. Co. v. Dodge*,⁸¹ has intimated a doubt whether a policy of insurance at the death of the person insured would become invalid on account of a stipulation which it contained, that if the property insured be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, the policy should be void. In that case, however, the policy was made payable to Chester Downer, a mortgagee, as his interest might appear; and the court said that, under such a provision, the mortgagee could not be cut off from the protection which the policy afforded him by the death of the person to whom it was issued. The logic of this decision may well be questioned, and indicates clearly the doubt of the court in regard to the main proposition, that, by the death of the insured, such a change occurred as to render the policy invalid, within the terms above expressed.

The court of appeals of Kentucky had under consideration this question in *Richardson's Adm'r v. German Ins. Co.*⁸² The policy, which was issued during the lifetime of Richardson, contained a stipulation that it should be void if, without the consent of the company, any change took place in the title, use, occupation, or possession of the property insured. The loss occurred after Richardson's death, and during the term for which the policy was written. We quote from the reasoning and conclusions of the Kentucky court as follows: "According to the only meaning we think the language used fairly capable of, the property was insured for a specified period of time, which could, after the premium had been fully paid, be avoided by the company only upon notice and refunding the unearned part of premium; and it agreed to make good, unto not merely the insured himself, but his executors, administrators, and assigns, the immediate loss or damage that might happen by fire or lightning to the property at any time during that period, whether before or after his death, and there-

⁸¹ 44 Mich. 420, 6 N. W. 865, and 9 Ins. Law J. 909.

⁸² 89 Ky. 571, 13 S. W. 1.

fore to treat that event as ipso facto a termination of the policy and liability under it, would be contrary to the express terms of it, render the stipulation for payment to the personal representatives of the insured superfluous, and allow the company to retain the full consideration paid, while being held to only part performance of its agreements.”⁸³

The reasoning of the learned court, we think, will fail to convince the average legal mind. The fact that the contract was terminated before the expiration of the term agreed upon, and for which payment of premium was made, has no important significance, as the same court has held;⁸⁴ and it is chiefly upon this fact that the court based its conclusions. The argument, if good, would defeat all forfeitures, or make them to depend upon refunding the unearned premium.

Where the policy provides that it will become void whenever any change takes place in the title, interest, or possession of the property insured, it is not necessary, to create a forfeiture, that an actual sale should be made. A change of interest or possession will often occur while the legal title will continue unchanged. The underwriter is alone concerned in the protection of the property, and these provisions of the insurance contract have no other purpose than to secure guaranties of good faith on the part of the insured. When a risk is accepted, it may be fairly presumed that the company taking the hazard has ascertained and considered carefully all important facts and circumstances affecting its character, and are satisfied to undertake the venture; but, to prevent anything from being concealed that ought to be disclosed, the validity of the policy is made contingent on a full and truthful expression of certain facts, which the policy specially mentions, and which the company deems material for its understanding of the risk, and for a basis of its judgment in regard to whether it should be accepted or declined. The character of the hazard being established to the satisfaction of the insurer, its next concern is that no material change shall take place without its consent; and this, too, is provided for by the terms of the policy. The insurer cannot watch its many ventures. They are often remote and widely scattered, and besides, too, the greatest dangers that menace property

⁸³ *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Va. 88, 6 Ins. Law J. 497; *Haxall v. Shippen*, 10 Leigh (Va.) 536.

⁸⁴ *Blackerby v. Insurance Co.*, 83 Ky. 574, 15 Ins. Law J. 756.

are those that are frequently hidden from public scrutiny. The only practicable plan, therefore, of preserving the status of the risk, is to make the validity of the policy depend upon the insurer being informed of any material changes made and its consent obtained. In most cases the insured is constantly apprised of the situation of his property, while the company which has assumed the whole responsibility in case of loss has its office in a distant city, and is entirely without the means of information. The necessities of the case are apparent, and the requirements contained in the policy in regard to notice and consent are reasonable and will be enforced by the courts with strictness. Mankind has not yet so far advanced in morals as to be no longer governed by motives that arise from considerations of personal interest. This fact is too well understood to need stating. It is recognized by all, and no business undertakings will succeed that are not based upon this underlying principle of human conduct. The underwriter acknowledges his belief in this general infirmity of the race by the careful provision he makes to guard against any motive for the destruction of the property he insures. He has learned in the lessons of experience that the chances of loss are increased in proportion as the interest of the holder of his policy is diminished. The supreme court of Iowa, in discussing this matter in connection with title, very properly said: "The object of the insurance company by this clause is that the interest shall not change, so that the assured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and preserving it from destruction by fire. Any change in or transfer of the interest of the insured in the property, of a nature calculated to have this effect, is in violation of the policy; but if the real ownership remains the same,—if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire, the policy is not violated."⁸⁵

§ 78. Levy under an Execution Voids the Policy.

Policies frequently contain a clause providing, in substance, that the liability of the company shall terminate if, without notice to and

⁸⁵ Ayres v. Insurance Co., 17 Iowa, 176.

its consent obtained, there shall be made a levy of an execution against the property insured, or if any change shall take place in the title, interest, or possession, either by legal process, voluntary conveyance, or from any cause whatever. Under contracts of this form, any substantial change affecting the interest, or even the possession of the property, will cause a forfeiture. Such change may fall far short of alienation, and, so far as possession is concerned, may even be unlawful and by force; yet, should such change occur, the insured has stipulated to assume the consequences. That it is competent for the parties to so contract, there appears to be no good reason to doubt. As has been shown, the purpose of the underwriter by this class of stipulations is to avoid being involved in contention respecting the ownership and possession of property to which it sustains contractual relations. The underwriter understands that these contests, whether right or wrong, always result in disappointment and loss to either one party or the other; and it thus often happens that dangerous enmities and vindictive feelings are created, imperiling property that would otherwise be secure. The insurer may make it a condition of the acceptance of a risk that it shall be wholly relieved from any controversies of this kind without notice, and the opportunity to consider and decide when circumstances arise that affect the interest or possession of the insured in the property covered. It has been many times held that the insurer may, by proper stipulations, exempt itself from liability on account of loss which has been occasioned by riot, insurrection, or other resistance to the regularly constituted authorities; but the liberty of imposing restrictive clauses in respect to unlawful interference with property rights is not limited to the violent and illegal acts of organized mobs. The insurer may put the whole responsibility of surrendering the property insured to the control of others, whether by force or legal process, on the one seeking insurance. The company, in accepting the risk, may do so without condition or qualification; or it may, in the absolute freedom of its will, limit its liability in any particular and to any extent. In such case it is only necessary that the restrictive clause should state distinctly, either in general or specific terms, the reservation which the company intends to insist upon. Where the policy, therefore, provides that it will become void if the possession be changed in any manner without consent, it will be no sufficient excuse for the

insured to say that he has been ejected by the sheriff on an illegal process, or that he has been overcome by force, and another has usurped possession. The insurer may well answer: "That is your affair, not mine. It is clearly expressed in the contract between us that possession is to continue unchanged. If you suffer yourself wrongly to be dispossessed, and a stranger to come into control of the property, our responsibility and obligation are ended. By the terms of our contract, we have never agreed to defend your title or secure your occupation of the property. This you must do for yourself." So far as we know, this precise question has never been considered by the courts, but we can find no valid reason why a contract stipulation such as we have here stated should not be held good. When, however, forfeitures are claimed, the courts will hold the insurer to the letter of the contract. No advantage will be given by construction.

In *Philadelphia Fire & Life Ins. Co. v. Mills*,⁸⁶ an execution was issued after judgment on the property of the wrong person, and the sheriff put a bailiff in possession of the goods. The execution was against the father, and the property levied on belonged to the son. The court said: "Properly speaking, a levy under any process is a levy in pursuance of the authority given by it; and an execution against one man never gives authority to levy on the goods of another. The levy in this case was not, therefore, properly under any process, and we discover no valid reason for extending that provision to the case of a wrongful levy. To do so would be to attribute to every levy that is valid in form the effect of avoiding a policy, though such levy should be invalid in substance, and should have endured but an hour."

The policy in this case contained the following condition: "The insurance by this policy shall cease from the time that the property hereby insured shall be levied on, or taken into possession or custody under an execution or other proceedings at law or equity." It appears from the report of the case that it was not a question entirely free from doubt whether the sale of the property by the father to the son was made in good faith; and Sharswood, J., in the trial court, instructed the jury "that, as the execution was against the father

⁸⁶ 44 Pa. St. 241, 4 Benn. Fire Ins. Cas. 730.

after a sale and delivery of possession to the son, the levy made under it was a wrongful one; and that, if the sale was bona fide and the levy consequently wrongful, it should not be regarded as a breach of the covenant in the policy; but that if the sale was not bona fide, if the alleged sale left the property in the father, and the son acquired nothing, but the transaction was intended to hinder and delay the creditors, then the levy would be such a one as the creditors had a right to make, such a one as was contemplated in the policy, and such a one as would avoid it." In this case it will be observed that the liability of the company was to terminate if the property was levied upon or taken into possession under an execution or other proceedings at law; and while the court, without qualification, sustained the "condition," it held that, as the sheriff acted in the matter without authority, what he did was wanting in the proper character of a levy, and that the proceedings were not in law. Had the policy provided that it would become void should any change of possession take place from any cause, the defense would have been good, notwithstanding the sheriff acted without authority, and his possession of the goods was usurped.⁸⁷

In *Western Assur. Co. v. Layer*,⁸⁸ the sheriff levied on the stock of a manufacturer, and placed a bailiff in charge, who was instructed not to interfere with the business of the concern, but was required only to allow nothing to be taken away. The work of the factory, under the surveillance of the bailiff, continued in the usual manner; and it was held that the possession of the sheriff was so much a qualified one as not to be a violation of the condition of the policy against "change of title or possession by legal process or judicial decree." The court⁸⁹ clearly indicated that, if there had been an actual disposing of the owner, the insurer would have been discharged. A levy upon real estate, when there is no change of possession, and where it does not appear that there has resulted any increase of the risk, will not cause a forfeiture under a policy stipulation that "it shall be void if the property insured shall be levied upon or taken into possession or custody under any proceedings in law or equity."

⁸⁷ *O'Brien v. Insurance Co.*, 56 N. Y. 52, 3 Ins. Law J. 685; *Dunlop v. Insurance Co.*, 74 N. Y. 145, 7 Ins. Law J. 711; *Western Assur. Co. v. Layer*, 14 Ins. Law J. 552.

⁸⁸ 14 Ins. Law J. 552.

⁸⁹ 14 Ins. Law J. 554.

This was held in *Smith v. Farmers' & Mechanics' Mut. Fire Ins. Co.*⁹⁰ We quote from the opinion of the court: "It did not appear, however, that there was anything more than a technical seizure, unaccompanied by any change of possession or increased risk. This was not sufficient to avoid the policy. The condition relied on has no application in the case of a mere technical seizure."

This decision is supported by *Colt v. Phoenix Fire Ins. Co.*,⁹¹ where substantially the same reasons are stated. Reynolds, J., said: "The levy of an execution upon real estate under an ordinary judgment is at this time unnecessary, and in fact is never done, and it may be said is now unknown to the law."

The levy on real estate in any case is a mere technical matter. There is and can be no change of possession. The property will continue to have the care and protection of the owner, who may remain for a long period to enjoy its use and occupation.

In *Hopkins Manuf'g Co. v. Aurora Fire & Marine Ins. Co.*,⁹² the condition was that, "if the property insured is levied upon or taken into possession or custody under any proceedings in law or equity, this policy shall thereupon cease." It was held, as in *Philadelphia Fire & Life Ins. Co. v. Mills*, supra, that the insurer would not be discharged unless the proceedings were valid.

So, also, in *May v. Standard Fire Ins. Co.*⁹³ Under a clause importing substantially the same condition, an execution was issued against the chattels insured, and the bailiff made a formal seizure, but did not interfere with the assured's custody or possession; nor was any one placed in charge of the property levied upon, and, a bond having been given soon after, the seizure was withdrawn. It was held that the obligation of the company to the mortgagee, to whom the loss was made payable, had not been affected; that the condition of the policy referred to change of possession that was actual, not constructive.

⁹⁰ 8 Ins. Law J. 828. ⁹¹ 54 N. Y. 595. ⁹² 48 Mich. 148, 11 N. W. 846.

⁹³ 5 Ont. App. 605; *Hooper v. Insurance Co.*, 15 Barb. 413, affirmed 17 N. Y. 424.

The policy condition that a levy of an execution shall cause a forfeiture applies only to chattel property. *Hammel v. Insurance Co.*, 54 Wis. 72, 11 N. W. 349; *Philadelphia Fire & Life Ins. Co. v. Mills*, 44 Pa. St. 241; *Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Pa. St. 151; *Carey v. Insurance Co.*, 84 Wis. 80, 54 N. W. 18; *Commonwealth Ins. Co. v. Berger*, 42 Pa. St. 285.

While the levy of an execution threatens the right of dominion which a person is accustomed to exercise over his property, there is no alienation; and, unless the levy is accompanied with a change of possession, the peril in which the debtor's right of control is placed will not generally affect the validity of the insurance, unless the policy provides for a forfeiture in such contingency.⁹⁴ The levy is an incident that refers to the financial extremity of the insured, and may frequently signify bad moral hazards and vexatious complications, which the prudent underwriter will wish to avoid; but right of property and "unconditional ownership" still continue with the debtor.

Metcalf, J., said, in *Rice v. Tower*:⁹⁵ "There are obiter dicta in the books that, by a seizure on a *fi. fa.*, the debtor's property in the goods is lost; that the sheriff acquires a special property; but that the general property of the debtor is divested, and is in abeyance. But the law never was so." When the policy provides that the insurer shall be discharged if the possession of the insured property be changed by legal process, and thereafter a writ of attachment issue in regular form from a court of competent jurisdiction, in the execution of which the owner of the property is dispossessed by the officer serving the writ, the insurance will terminate; and this will be true although the suit is not sustained, and the ancillary proceedings fail.⁹⁶

⁹⁴ *Wilbraham v. Snow*, 1 Lev. 282; *Id.*, 1 Vent. 53; *Clerk v. Withers*, 6 Mod. 293; *Id.*, Holt. 647; *Ladd v. Blunt*, 4 Mass. 403; *Ladd v. North*, 2 Mass. 517.

⁹⁵ 1 Gray (Mass.) 426, 427.

⁹⁶ In *Carey v. Insurance Co.*, 84 Wis. 80, 54 N. W. 18, the policy had the following condition of forfeiture: "If any change takes place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree, * * * then in every such case this policy shall be void." After the issue of the policy the insured property was taken into possession of the sheriff, in the execution of a writ of attachment. The contention was that the writ of attachment was not a "legal process," and that the alleged levy, therefore, had no effect in law, and was not sufficient to avoid the policy. The attachment was dissolved long after the destruction of the insured property, which occurred while in the custody of the sheriff. The court said: "It was held on the traverse of the affidavit that the writ never ought to have issued, and that there were no grounds for it. Does such fact make the writ any less a 'legal process' when served? It was a legal process when issued. It was issued by authority of and according to law. It was based on a sufficient

§ 79. A Real-Estate Mortgage will not Void the Policy unless It is So Stipulated.

The rights of the parties will always, of course, depend upon the language of the policy. If the contract is silent in regard to incumbrances, their existence will generally be held to be immaterial. When words of doubtful meaning are employed to express the intention of the parties, which is frequently the case, the courts are called upon to interpret, and will generally do so in such a manner as to give them such an effect as will best support the principal obligation of the contract. The language being that of the company, when it is ambiguous or of uncertain meaning it will be construed more favora-

affidavit. The dismissal of the attachment on the trial of the traverse did not make the writ void when it was issued. It was a protection to the officer, and a valid process. * * * It was a legal process when it was served, and changed the possession of the property. That was sufficient. The possession of the property was changed by it at the time lawfully, and it put the officer in possession of it lawfully. It was this change of possession that enhanced the risk, and avoided the policy."

In the case of *St. Paul F. & M. Ins. Co. v. Archibold* (Tex. App., 1885) 16 Ins. Law J. 153, the court there said: "This was a suit upon a policy of insurance against fire. The house insured was used and occupied by appellees as a place of business as merchants, at the time the contract was made, and the policy provided that '* * * if any change takes place in the * * * possession, whether by * * * voluntary act or otherwise, * * * this policy shall be void.' With or without the consent of appellees, legally or illegally, the sheriff of McLemen county had possession of the house at the date of the fire. The court instructed the jury, in effect, that the illegal possession by the sheriff did not vitiate the policy, under the clause quoted, unless the danger of fire was increased. This was not the contract of the parties. Whether the risk was increased or lessened, or the possession of the sheriff was lawful or in violation of law, by the consent of appellees (unless as their agent) or against their wish, the parties have agreed that the contract is void if the possession is changed. The stipulation may be unreasonable, and even outrageous, but it is the contract. It is not open to construction because it is ambiguous, it is not impossible, illegal, immoral, or against public policy, or for any reason void. That it is improvident or otherwise does not warrant the interference of the court. *Galveston Ins. Co. v. Long*, 51 Tex. 89; *Crescent Ins. Co. v. Camp*, 64 Tex. 521. The charge deprived appellant of the benefit of its contract, and the judgment against it, for this error, must be reversed, and the cause remanded."

bly for the insured than for the insurer; but, when the language is clear and explicit, it will be applied by the court with strict impartiality to the circumstances which each individual case presents. Much of the litigation in insurance cases arises either from a careless use of words in formulating the contract, or from the occurrence of a loss under circumstances that had not been contemplated by the parties at the time the insurance was effected. We will now examine a few authorities applicable to this branch of the discussion, selected from different courts, for the purpose of illustrating the uses of certain words and phrases common to the insurance contract, and intended to terminate the liability of the insurer under a variety of forms and circumstances should the property insured become incumbered. Most policies now in use provide in some form of words that they shall be void if the property covered is, at the inception of the insurance, or shall afterwards become, incumbered by mortgage or otherwise, unless the fact of such incumbrance is represented to the company, and its consent expressed in writing on the policy. This condition the courts have held, without dissent, to be reasonable and binding on the insured. After the delivery of the policy, the insured will be presumed to know what it contains, and to understand the effect of all its terms and conditions.⁹⁷

§ 80. The Insured must Disclose Title and Incumbrances When So Required by the Policy.

In *Beck v. Hibernia Ins. Co.*,⁹⁸ the policy, in sufficient and proper language, required a disclosure of the title, incumbrance, etc. The property was mortgaged at the time the insurance was effected, but the fact was not represented to the company. We quote from the opinion of the court: "In this view of the case, it was wholly immaterial whether the existence of the incumbrance was material to the risk or not, or whether the fact that none was disclosed induced the insurer to issue the policy or not. The parties themselves, by their contract, have made it material, and have stipulated that, if incumbrances were not disclosed, the policy should be void. This construc-

⁹⁷ *Schumitsch v. Insurance Co.*, 48 Wis. 26, 3 N. W. 595; *Morrison v. Construction Co.*, 44 Wis. 410; *Fuller v. Insurance Co.*, 36 Wis. 599; *Strohn v. Railroad Co.*, 21 Wis. 562; *Gilbert v. State*, 90 Ga. 691, 16 S. E. 652.

⁹⁸ 44 Md. 95.

tion of the policy answers also the argument that the company is estopped from setting up this default."

The general principle of law here stated lies at the foundation of the whole matter. Conceding what cannot be denied, that the covenant in regard to disclosures is within the power of persons entering into contracts, there are only two questions that can properly be presented for the consideration of the court: First. Were the disclosures made? Second. Has the condition been waived? To urge other matters, such as the fact that the mortgage had been forgotten, or that it was not material, is to attack the integrity of the contract itself, and, by implication, to deny parties the liberty of agreeing between themselves what is material, or on what conditions the obligation of performance shall rest. The courts have no more power to change or modify an existing contract than they have to prescribe the terms and conditions of an original one. It is their duty to ascertain what the actual agreement was between the parties, and to give to such agreements their proper legal effect. We again quote from the language of the court: "The case is simply this: The assured applied for insurance on certain buildings, which he represented as belonging to himself. He failed to state that they were incumbered by mortgage, and accepted a policy which required him to make such statements if the facts were so, and that the insurance would be void if he did not. The obligation rested on him, and no omission of duty is imputable to the insurer. If, in such case, the insurer cannot avail himself of the express stipulation of the contract, there is no conceivable case in which such a condition can be made available, and it might as well be said at once that parties have no power to make such contracts."

We find a very concise and intelligent statement of the duty of the court to enforce contracts made by the parties, in an opinion by Judge McCrary, in the case of *Waller v. Northern Assur. Co.*⁹⁹ The policy in that suit contained a provision as follows: "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building stands on leased ground, it must be so represented to the company, and so expressed in the written part of the policy; otherwise, the policy will be void." On

⁹⁹ 10 Fed. 232.

the trial it was disclosed that the plaintiff's interest was that of a mortgagee only, although he held a deed, and was in actual possession. At the time the insurance was effected, no questions were asked by the agent, and no representations made by the plaintiff, in regard to title. After stating the facts substantially as above, **Judge McCrary** said: "There are strong reasons for upholding and enforcing the provisions of the policy under consideration. It is certainly a very reasonable and proper provision in a contract of insurance of this character, which requires the party seeking insurance on property to state any facts which it is material for the insurer to know. That the nature and extent of the interest of the assured in the property is material must appear very clear upon the least reflection. * * * But it is insisted that compliance with this provision of the policy was waived by defendant company, because its agent made no inquiry concerning the extent of the plaintiff's interests, and plaintiff made no statement on the subject. The evidence does not support this position. The contract was that, if the interest of the insured was any other than entire, unconditional, and sole ownership, then he was to represent the facts to the company; not that he was to disclose them truthfully if requested, and that he would make true and full answers to questions on the subject. The duty of disclosing his interest, the same being less than the entire ownership, devolved upon the plaintiff, and for good reasons, since he knew, and the agent of the company did not know, the facts. In other words, under the contract the defendant was authorized to assume that the property was owned absolutely by the applicant for insurance, unless the contrary was represented by him, and more especially in that case where the applicant held what appeared to be an absolute title. A waiver of this condition of the policy cannot therefore be presumed from the mere fact that the agent of the defendant made no inquiry on this subject. * * * Besides, it would be an unwarranted extension of the doctrine of estoppel to hold that a party may waive that the existence of which he does not know, and is not in duty bound to ascertain."¹⁰⁰

¹⁰⁰ East Texas Fire Ins. Co. v. Clarke, 79 Tex. 23, 15 S. W. 166.

Incumbrances must be disclosed. Wilcox v. Insurance Co., 85 Wis. 193, 55 N. W. 188.

Conditions concerning forfeitures reasonable, and in the interests of a true

It has been held in Pennsylvania that, when the incumbrance is a matter of public record, the insurer will be presumed to have notice.¹⁰¹ This new and somewhat startling doctrine was modified by the Indiana court of appeals, where it was held that the insurer would not be charged with knowledge of an incumbrance placed on the property after the issuance of the policy, although such incumbrance had been duly entered of record.¹⁰² And a wholly different ruling is given by the courts of Texas.¹⁰³

In *Gerling v. Agricultural Ins. Co.*, the policy provided that it should be void if, without notice and consent, the property insured should become incumbered by mortgage, deed of trust, or judgment. The West Virginia court, who reviewed the case, was of the opinion that only voluntary incumbrances were intended, and that a judgment would not cause a forfeiture, unless the judgment was by confession.¹⁰⁴

Both Nebraska and Pennsylvania have declared that incumbrances need not be disclosed unless particularly inquired about. In the Nebraska case the policy distinctly required that full disclosures should be made.¹⁰⁵

In a case before the civil court of appeals of Texas, the policy expressed the condition that the insurer should not be liable for loss if the property insured should be incumbered, and the fact of such incumbrance was not represented, and consent indorsed on the policy. The insurance covered on several subjects, and it was held that the

public policy. *Dover Glass-Works Co. v. American Fire Ins. Co.* (Del. Err. & App.) 29 Atl. 1039; *Guinn v. Insurance Co.* (Tex. Civ. App.) 31 S. W. 566; *Fireman's Fund Ins. Co. v. Barker* (Colo. App.) 41 Pac. 513.

Incumbrances on insured property enhance the risk, and decrease the security of the insurer. *Peet v. Insurance Co.* (S. D.) 64 N. W. 206; *Collins v. Insurance Co.* (Iowa) Id. 602; *Georgia Home Ins. Co. v. Stein*, 72 Miss. 943, 18 South. 414; *Webster v. Insurance Co.* (Ohio Sup.) 42 N. E. 546; *Lester v. Insurance Co.* (Miss.) 19 South. 99; *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13, 26 S. W. 763.

¹⁰¹ *Collins v. Assurance Corp.*, 165 Pa. St. 298, 30 Atl. 924.

¹⁰² *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 157.

¹⁰³ See different ruling. *Aetna Ins. Co. v. Holcomb* (Tex. Sup.) 34 S. W. 915.

¹⁰⁴ 39 W. Va. 694, 20 S. E., on page 692.

¹⁰⁵ *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *McGonigle v. Insurance Co.*, 168 Pa. St. 14, 31 Atl., at page 874.

policy was separable, and that the forfeiture was limited to the subjects only to which the incumbrance related.¹⁰⁶

Where the property insured to one of the heirs of an estate was charged by will with the payment of \$8,000 to other heirs, it was held to be incumbered, within the meaning of the policy.¹⁰⁷

It is immaterial whether the lien comes to exist by the action of law or by the voluntary act of the insured; the qualified interest and lessened watchfulness is the essential incident in either case.¹⁰⁸

The policy permitted a mortgage of \$10,000. Afterwards this was partly paid; then, later still, was reloaned with a new mortgage. Both mortgages, at the occurrence of the fire, aggregated less than \$10,000. It was held that, as the indebtedness had not been increased, there was no forfeiture.¹⁰⁹

In the absence of any express stipulation to give it such effect, an incumbrance is not a change of title, nor such change of interest as will avoid the policy.¹¹⁰

It was a condition of the insurance that, if the property was incumbered by chattel mortgage without notice and consent, the policy should be invalid. This language was construed to mean that the forfeiture would occur only if the entire property was thus incumbered.¹¹¹

A stipulation in the policy requiring the assured to give notice to the company of any incumbrance or levy upon the property insured is a material provision and a substantial part of the contract.¹¹²

When the property was insured, there was a mortgage in favor of P. for \$1,000, consented to by the company. Subsequently, this incumbrance was removed, and the insured property again mortgaged

¹⁰⁶ *Alamo Fire Ins. Co. v. Schmitt* (Tex. Civ. App.) 30 S. W. 833.

¹⁰⁷ *Renninger v. Insurance Co.*, 168 Pa. St. 350, 31 Atl. 1083.

¹⁰⁸ *Capital City Ins. Co. v. Autrey*, 105 Ala. 269, 17 South. 326.

¹⁰⁹ *Georgia Home Ins. Co. v. Stein*, 72 Miss. 943, 18 South. 414.

¹¹⁰ *Germania Fire Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286.

¹¹¹ *North British & Mercantile Ins. Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091.

¹¹² *Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Pa. St. 151; *Moore v. Insurance Co.*, 72 Iowa, 414, 34 N. W. 183; *Hankins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34; *Herbst v. Lowe*, 65 Wis. 321, 26 N. W. 751; *Brown v. Insurance Co.*, 59 N. H. 298; *Thomson v. Insurance Co.*, 90 Ga. 78, 15 S. E. 652; *Wilcox v. Insurance Co.*, 85 Wis. 193, 55 N. W. 188.

to another person for a smaller amount. There was a provision in the policy that if the property insured should subsequently become incumbered, without the consent of the company in writing, the policy should be void. Such consent was not obtained, and the insurer was discharged. It was claimed by the plaintiff that the company having consented to the mortgage held by P., which was afterwards canceled, and a new one placed on the property in favor of another person, the later incumbrance for the same or a less amount would not void the policy. But the court held otherwise, and in support of this decision we think there are two valid reasons: First. The policy provided that if the property should be subsequently mortgaged, without the consent of the secretary in writing, it should become void. This provision relates wholly to subsequent acts and conditions, and was no doubt intended by the company to secure full information concerning changes that might afterwards take place in the circumstances of the property that would affect the character of the hazard. This the insurer had a right to stipulate for, and did so in language that needs no interpreter. Second. The company consented, not that the property might be incumbered for a specified sum during the term of the insurance, but to the existence of a particular mortgage in favor of P. This incumbrance was discharged soon after the policy was issued. Perhaps the company had received information that an early cancellation of the mortgage would occur, and may have been influenced by that consideration in its acceptance of the risk. However that may be, the consent to a particular mortgage held by a person specified will not authorize the insured to place another mortgage on the premises running to a different party, even though the last mortgage is for a less sum than the first. Incumbrances frequently exist under circumstances where the amount involved is a fact of the least importance, as affecting the moral aspects of the hazard.¹¹³

§ 81. When Judgment Liens Void the Policy.

In *Bowman v. Franklin Fire Ins. Co.*¹¹⁴ the policy required that "any incumbrance on the property insured, whether existing at the

¹¹³ *Hankins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34; *Agricultural Ins. Co. v. Morrow*, 43 Neb. 788, 62 N. W. 212.

¹¹⁴ 40 Md. 620, 3 Ins. Law J. 935.

time of the issuing of the policy or imposed subsequently, must be assented to by the company; otherwise, the policy shall be void." It was an undisputed fact that, at the inception of the insurance, there were judgment liens existing against the property, of which no knowledge was communicated to the company. In its discussion of the case, the court said: "The condition of the policy is a substantial and important one for the protection of the company, and there is no good reason to suppose that judgment liens were not as much within the object of the provision as any other incumbrance. The great purpose of all such provisions in policies of insurance is to enable the insurer to determine the extent of the risk, and the value and extent of the interest of the assured in the premises. If the property to be insured is incumbered by judgments, mortgages, or liens for unpaid purchase money, it is always of importance for the insurance company to be informed of the fact, as, upon the existence or nonexistence of real interest or motive on the part of the insured to protect and preserve the property, the premium for insurance may be justly regulated. This is a substantial element in the contract of insurance, and there is no good reason for the restricted construction of the clause contended for by the plaintiff."

In *Pennsylvania Mut. Fire Ins. Co. v. Schmidt* ¹¹⁵ the court said: "The clause in the policy is a covenant against incumbrances. It was therefore immaterial whether the plaintiff had actual knowledge of the judgment or not. He was bound to know it. He had covenanted against it. The judgment was his act. It was entirely upon his warrant of attorney, and after the fire he paid it, and had it satisfied. That it was given under an agreement of the hook and ladder company not to enter it up, and that the company violated said agreement is not to the purpose. It is possible he may have his remedy against the company for any loss he may sustain by reason of their breach of faith, but that act of a third party can in no way affect this contract of insurance. The covenant against incumbrances is a reasonable one, and the principle upon which it is founded is a sound one."

The same court, in *Brown v. Commonwealth Mut. Ins. Co.*,¹¹⁶ ex-

¹¹⁵ 119 Pa. St. 449, 13 Atl. 317.

¹¹⁶ 41 Pa. St. 187.

plains the importance of the provision incorporated in the insurance policy, requiring a disclosure of incumbrances. We quote as follows: "It goes upon the theory of an increased risk by reason of incumbrances. If a man may incumber his property to its full value, and then insure it to its full value, it may easily be seen how it may be turned into a source of profit."¹¹⁷

In *Blooming Grove Mut. Fire Ins. Co. v. McAuerney*,¹¹⁸ the application was made a warranty, and the question being asked, "What incumbrance on the property?" was answered "None." On the trial it appeared in evidence that, when the application was being filled up by the agent of the company, he was told by the applicant that he had given a judgment note, but that he did not know whether it had been "entered up" or not; that the agent then asked if he should "put it down incumbrance or no incumbrance," and was answered that he "could do as he pleased." The agent then said, "I will put it down no incumbrance." To this declaration plaintiff made no answer. It was held that, the statement being written with plaintiff's assent, without his knowledge whether it was true or not, and being a warranty, he elected to take the risk, and, being in fact untrue, there could be no recovery.

During the life of the policy there was a confession of judgment on a penal bond, conditioned upon the restoration of certain property which had been levied upon by the sheriff, and upon which execution had been stayed. Subsequently, on demand of the sheriff, the property was produced. The policy provided for a forfeiture in case the property should without notice and consent become incumbered by judgment or otherwise. It was held that the judgment entered was an incumbrance, and the company not liable.¹¹⁹

It is imperative that the insured shall act in absolute good faith in representing the character of the risk. If he conceals anything

¹¹⁷ See, also, *Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Pa. St. 151; *Seybert's Adm'rs v. Insurance Co.*, 103 Pa. St. 282; *Beck v. Insurance Co.*, 44 Md. 95; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431; *German-American Bank v. Agricultural Ins. Co.*, 8 Mo. App. 401; *Sentell v. Insurance Co.*, 16 Hun (N. Y.) 516; *Gould v. Insurance Co.*, Id. 538.

¹¹⁸ 102 Pa. St. 335.

¹¹⁹ *Seybert's Adm'rs v. Insurance Co.*, 103 Pa. St. 282; *Hench v. Insurance Co.*, 122 Pa. St. 128, 15 Atl. 671.

which he ought to disclose, he will do so at his peril. This is well illustrated in a Vermont case.¹²⁰ The insured warranted that he had not omitted to state anything material to the risk. There was an undisclosed mortgage held by a friend of the insured. The note had been purposely destroyed by the mortgagee, and, as it appears, with the intention of canceling the incumbrance. Of this purpose on the part of the holder of the mortgage, the insured had no knowledge. The mortgage continued on the public records as undischarged, and the insured had every reason to suppose that it was a valid and subsisting incumbrance at the time the insurance was effected. The court held it to be such a breach of the warranty as to discharge the company.

In a recent case before the court of West Virginia, the policy provided for a forfeiture if the property should become incumbered by mortgage, deed of trust, or judgment; and the conclusion reached was that the parties only intended to prohibit voluntary incumbrances, and hence that no judgment, except by confession, would release the insurer.¹²¹

This decision is clearly repugnant to the language of the contract, and we can find nothing in the circumstances of the case to justify a construction so illogical and strained. All stipulations and conditions concerning incumbrances have but one purpose,—to protect the insurer from the perils that come to exist when the insured is no longer master of his affairs. If the mortgage conceals anything of danger, because of the lessened interest which the owner has in watching the insured property, then may the judgment well cause alarm, as it signifies a loss of credit, and an extremity in business and financial conditions, which may tempt persons of weak moral fiber to draw on every available resource, and to employ desperate and even dangerous means of escape. A person's integrity can usually be relied on when his affairs are prosperous, but it is otherwise when buffeted by an "outrageous fortune." It is to this fundamental principle in the human character that all the conditions of the policy in regard to incumbrances refer.¹²²

¹²⁰ *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353.

¹²¹ *Gerling v. Insurance Co.*, 39 W. Va. 689, 20 S. E. 692.

¹²² 1 May, Ins. § 292a. The author says, referring to *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 18 Ins. Law J. 592: "The court gives no

§ 82. When Sale under an Execution Voids the Policy.

The case of *Reaper City Ins. Co. v. Brennan*¹²³ presents a question of title that not unfrequently arises in litigation under the insurance contract. The policy stipulated that it should be void if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership, unless so represented and expressed in the written part of the policy. At the time the insurance was effected, the property had been sold under an execution, but the period within which it might be redeemed had not then expired. Lawrence, C. J., said: "We must hold this defense valid. It cannot truthfully be said that the assured, at the date of the insurance, had the entire, unconditional, and sole ownership of the property. On the contrary, the purchaser at the sheriff's sale, although he had not acquired a complete title, either legal or equitable, * * * had certainly acquired an interest in the land to the extent of his bid, which would in a few months ripen into a title unless redeemed. With this outstanding and paramount interest vested in another, the title of the assured was not entire and valid."

Where the sale is voidable, and is set aside before the fire occurs, the validity of the policy will not be impaired.¹²⁴ When a sale of the insured property is made, whether voluntary or involuntary, if the ownership passes to the purchaser, the insurance held by the original owner is terminated, because nothing remains with him to insure. Should the property burn, it will be the new proprietor, and not the old one, who sustains the loss. The only fact to be determined in respect to a sale, either compulsory or voluntary, is whether the negotia-

reason for the opinion. If the reason for wishing to know of incumbrances is to gauge the applicant's interest to care for the property, then a statute lien is as much within the reason as any other, if the assured knows of it. It certainly is covered by the words 'lien or incumbrance of any kind,' and unless the applicant was ignorant of the fact that taxes were a lien, which fact did not appear, he should have stated the tax lien." *Pennsylvania Mut. Fire Ins. Co. v. Schmidt*, 119 Pa. St. 449, 13 Atl. 317; *Lang v. Insurance Co.*, 74 Iowa, 673, 39 N. W. 86.

¹²³ 58 Ill. 158; *Browning v. Insurance Co.*, 71 N. Y. 508.

¹²⁴ *Commercial Union Assur. Co. v. Scammon* (Ill. Sup.) 12 N. E. 324, 10 Western Rep. 342; *Id.*, 123 Ill. 601, 14 N. E. 666.

tions, if voluntary, have terminated in the agreement of the parties and a delivery of the property, and, if sale be made under process of the court, have the proceedings advanced to the point of creating a new ownership, and extinguishing the old one.

In *Tierney v. Phoenix Ins. Co.* there had been a forfeiture on account of foreclosure and sale. After the fire, proceedings at law were had to set aside the sale, and to vacate the judgment of foreclosure. In this suit it would seem that there was no contest between the plaintiff, Tierney, and the assignee of the mortgagee, who bought in the property. The defendant insurance company was not made a party to this suit. The court held that the judicial annulment of the foreclosure and sale was not sufficient to restore the liability of the defendant company under its policy; that it was necessary to show the actual invalidity of such proceedings, not that a court had so decided in an action to which the insurer was not a party.¹²⁵

§ 83. The Courts will Give Effect to the Plain Provisions of the Contract.

While it is always the duty of the court to enforce contracts as made by the parties, their judgments will usually be tempered with mercy, and express a just partiality for the right; and hence it is frequently found that they are exceedingly reluctant to give effect to arbitrary provisions that are repugnant to the common sentiments of justice, and especially when to do so will result in forfeitures and the defeat of substantial rights. When a warranty is the subject of contention, the court will generally limit its inquiry to the fact of whether a warranty exists. If such is found to be the case, and no waiver has resulted, the court has then a plain duty to perform, and this cannot be changed or influenced by any consideration of the manner in which the interests of the parties may be affected. The reasons for the particular provisions of the contract to be enforced can have no significance except as they may explain the intention of the parties. It is not difficult to understand why companies should be cautious about insuring property that is incumbered. Mortgages not only lessen the interest which the owner

has in the property insured, but it is well understood by the underwriter that financial embarrassment and want of thrift frequently refer to traits of moral and business character which suggest that which is known in the business of insurance as a "moral hazard." If this is true of a mortgage, it is also true in a greater degree of such incumbrances as mechanics' liens and judgments, which clearly show extraordinary conditions, and sometimes indicate a dangerous exigency in the insured's affairs. The insurance company may well hesitate to continue its policy in the hands of one who has thus been pressed to the verge of financial disaster. A person in a situation of so much distress cannot be relied upon for prudent action in respect to the protection of the property insured; and, besides, there will frequently exist under such circumstances a dangerous temptation to escape from the threatened disasters by realizing on the insurer's promises of indemnity. But, however important incumbrances may be as affecting the character of the risk in the manner here indicated, the liability of the company will not be limited unless it is so provided in the policy. It is wholly a matter of agreement, and, when incumbrances are prohibited by the contract, the question of materiality may be regarded as settled.

§ 84. Statement of General Principles Concerning Title, Alienation, and Incumbrances.

The facts in regard to title and ownership, incumbrance, and possession of the insured property are always important to the insurer, as the character of the hazard is often affected by these circumstances. When a person's interests in a property are qualified or complicated, the motive to care for and protect is weakened; and, following the principle that in a large majority of cases governs conduct, we may expect to find indifference and often neglect where interested vigilance is required to secure safety. When a person insures property where the title is in dispute, or if it be heavily incumbered, there will sometimes exist a dangerous temptation to withhold protection to such a degree as to invite accident, and this may frequently be done without a conscious intent of wrongdoing on the part of the insured. This fact is always recognized by insurance companies; and as the success of their undertakings is not

based on the exceptional, but the general, principles of business morality, their purpose is to fix relations under the contract that will create no motive on the part of the insured for the commission of crime. It will be found, therefore, that policies generally provide that when the property becomes incumbered, or any change takes place in title or possession, notice of the fact must be given to the company, and its consent had, or a forfeiture will result. This provision has always been sustained by the courts as being a proper subject of contract, intended to lessen crime and promote public morality. The validity of this condition of the policy has, of late, seldom been called into question. When disputes have arisen, they have generally grown out of waiver and estoppel, or as to whether the facts presented constituted a forfeiture within the terms of the policy.

In a recent case before the supreme court of Iowa,¹²⁶ it was held, as a matter of law, that a chattel mortgage did increase the risk. In that case there was nothing shown to emphasize or qualify the manner in which the mortgage affected the hazard, and the decision of the court rested upon a naked principle of law. The court said: "The giving of a chattel mortgage is beyond question an increase of the risk, and a decrease of the defendant's (insurer's) security, because thereby the insured lessened his interest in the insured property." It was contended by the plaintiff that the question of the increase of the hazard was one of fact, and should have been submitted to the jury, but the court held otherwise. This same principle was very correctly and tersely stated in *Brown v. Commonwealth Mut. Ins. Co.*¹²⁷ The court said: "It goes upon the theory of an increased risk by reason of the incumbrance. If a man may incumber his property to its full value, and then insure it to its full value, it may easily be seen how it can be turned into a source of profit. That the risk was increased by the entry of this judgment is assumed by the terms of the policy."

The supreme court of the United States has handed down a decision in *Thompson v. Phenix Ins. Co. of Brooklyn*,¹²⁸ that a change of receiver was not a change of "title and possession,"—in fact, that

¹²⁶ *Lee v. Insurance Co.*, 79 Iowa, 379, 44 N. W. 683.

¹²⁷ 41 Pa. St. 187.

¹²⁸ 136 U. S. 287, 10 Sup. Ct. 1019.

a receiver was only an officer of the court, but that, in the legal sense, he had neither "title nor possession." In that case the policy was issued to "Kearney, receiver," who subsequently resigned; and Thompson, the plaintiff, was appointed. It is admitted that, when the risk was assumed, Kearney had the actual possession and control of the property, which was a large hotel, and that subsequently, without the knowledge and consent of the company, a stranger was substituted, who was to have the charge and management of the property, and on whose discretion and care the company depended for protection against accident and loss.

When property is held jointly by several partners, and one sells his interest to another, it has been held frequently that such change in ownership will not relieve the insurer; but the rule is otherwise where a stranger is introduced. The distinction here made between the retirement of a partner on whom the insurer may have chiefly relied for the prudent and protective management of the property and the bringing in of a new partner, who may have no influential control in the partnership affairs, has no basis in practical business, and should not, I think, have the sanction of the courts. This question has been often passed upon, and the decisions all rest upon a theory that is plausible, but fallacious, as it fails to recognize—First, the clearly-expressed terms of the contract, and, second, entirely ignores important considerations that may have influenced the insurer when accepting the risk.¹²⁰

A contract of sale, although payment has not been made, will discharge the insurer when the policy provides against alienation; but a contract to sell at some future time will not have that effect. A person holding a "contract for a deed" is in law the owner of the property, and may insure as such, and, notwithstanding he has defaulted in his payments, in case of loss can recover on his policy. The relation between the holder of the contract and he who gave it is, in legal effect, that of mortgagor and mortgagee. The fact of the incumbrance, of course, must be disclosed when so required by the policy. When

¹²⁰ Powers v. Insurance Co., 136 Mass. 108; Burnett v. Insurance Co., 46 Ala. 11; Pierce v. Insurance Co., 50 N. H. 297; West v. Insurance Co., 27 Ohio St. 1; Lockwood v. Assurance Co., 47 Conn. 553; Texas Banking & Ins. Co. v. Cohen, 47 Tex. 406; New Orleans Ins. Ass'n v. Holberg, 64 Miss. 51, 8 South. 175; Allemania Fire Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538.

a person dies, having real estate insured, and a loss subsequently occurs, there can be no recovery, as there has been a change of ownership. If the insured died intestate, the buildings insured become as absolutely the property of the heirs as though they had acquired them by purchase, and held a title deed. When the policy is so written as to import an agreement to pay the "executors, administrators, and assigns," the insurer will even then be liable only for loss that had occurred, but had not been paid during the lifetime of the insured. The courts have held that this language cannot be construed as an agreement to insure the "executors or administrators," but only to pay to them such sums as may have been due from the insurance company on account of loss during the lifetime of the insured. This was held by the New York court of appeals in *Hine v. Woolworth*.¹³⁰ The personal character of the contract is again affirmed in this refusal of the New York court to recognize as parties to the contract the heirs of the deceased policy holder.

In 1890, the Missouri court of appeals had under consideration this same question; and in the opinion written by Justice Ellison we have a lucid statement of the law. He said: "Upon the death of the ancestor intestate, the realty becomes the absolute property of the heir, subject to the payment of debts. The loss occasioned by the burning of a house after the death of the ancestor is the loss of the heir. * * * The distinction must not be lost sight of between the substantial rights of the administrator and the heir when the loss is before the death of the ancestor and when after. If before the death, the loss is that of the ancestor. In such case the proceeds of the policy are personalty, for it is the owner who has been insured against loss. The property burning after the death of the ancestor, properly speaking, is not insured."¹³¹

While such interpretation of the law and the contract as relieves the insurer on the event of the death of the insured will often be a hardship to the family of the deceased, it is difficult to see how such consequences can be avoided without an abandonment of substantial rights. To illustrate: Suppose Brown, owning buildings, procures a policy of insurance in a company which has, after due inquiry, ascertained that he is a man of good character, is prudent, careful,

¹³⁰ 93 N. Y. 75.

¹³¹ *Sauner v. Insurance Co.*, 41 Mo. App. 480.

and in all respects a suitable person to insure; but, during the term of insurance, Brown dies intestate, and the property descends to heirs who are notoriously of bad character,—persons whom no prudent company would insure in the first instance. It is easy to understand that here is something that had not been contemplated when the company insuring had originally entered into mutual covenants with Brown. These heirs are strangers to the insurer, and, in common justice, have no claim to be recognized. To base a relationship on the principle of succession that would never have come to exist by the voluntary act of the parties would practically prohibit in such cases the insurer from exercising the right of selection,—a right inseparable from a successful management of an important and much complicated business. Sentiment, coupled with an active desire to protect the weak and unfortunate, has caused insurance companies in a large majority of cases to voluntarily continue their contracts without indorsement to heirs and estates, thus affording to this class of claimants, by grace, the benefits of indemnity which could not be demanded under the law or the contract.

Change of title, or the placing of an incumbrance on the property insured, is sometimes of less importance to a company insuring than change of possession; and, when this occurs, policies generally provide, with excellent reason, that liability shall terminate, and this, too, will result whether the change be voluntary, by force, or even through instrumentalities that are in violation of law, if the proceedings are had under legal forms, and conducted by those who are the appointed officers of the court. Concerning these points, while there is much that is plain, there is also much that cannot be stated with absolute certainty, as the courts have frequently been called to decide where questions of this kind have not been presented as naked and independent propositions.

When property insured is taken into custody by the sheriff or other officer of the court under a writ of attachment or execution, the insurer will be relieved; but it has been held otherwise when the levy made by the officer was illegal. In *Philadelphia Fire & Life Ins. Co. v. Mills*,¹²² the sheriff, with an execution against the father, levied on the property of a son, and put a bailiff in posses-

¹²² 4 Benn. Fire Ins. Cas. 730.

sion of the goods. The court said: "Properly speaking, a levy under any process is a levy in pursuance of the authority given by it, and an execution against one man never gives authority to levy on the goods of another. The levy, therefore, in this case, was not properly under any process." And the learned judge very logically concluded that as the sheriff, in making a levy, did not have the authority of the court to support his act, the change of possession having been accomplished by force and usurpation, the policy was not voided. In *Smith v. Farmers' & Mechanics' Mut. Fire Ins. Co.*¹³³ it was held that a mere technical levy upon real estate, under judicial process, not involving an actual change of possession or increase of risk, did not avoid the policy, containing a provision that the insurance should cease from the time the property insured should be levied upon, or taken into custody or possession, under any proceedings in law. "It does not appear," said the court, "that there was anything more than a technical seizure, unaccompanied by any change of possession. This is not sufficient to avoid the policy."

The test applied by the court in this case, and in several others which I have examined, appears to relate to the question whether the change of possession was actual, or only technical or constructive. Whenever the owner has been dispossessed by an officer acting under the forms of law and by the authority of the courts, there has been such substantial violation of the rights of the insurer as to cause a forfeiture. This was held in the case of *St. Paul Fire & Marine Ins. Co. v. Archibold*.¹³⁴ This property was, it is shown, in the illegal possession of the sheriff. The court said: "Whether the risk was increased or lessened, or the possession of the sheriff lawful or in violation of law, by the consent of bailees or against their wish, the parties have agreed that the contract is void if the possession is changed;" and then adds that this agreement is not immoral, illegal, or contrary to public policy, and one that the courts must uphold.

§ 85. Conclusions.

In the absence of fraud or mistake, the assured, by accepting a policy, will be presumed to know its contents, and he will be as firmly

¹³³ 89 Pa. St. 287.

¹³⁴ 16 Ins. Law J. 153.

bound by its terms and conditions as though it had been signed by his own hand.

The husband cannot insure as his own the property of his wife, nor can the wife insure as her own the property of her husband. Each has an insurable interest in the property of the other, which can be protected under a suitable form of policy.

When the contract is to sell, and is so expressed that ownership is not to pass until the purchase price is fully paid, the vendee cannot insure the property as his own. While having an insurable interest to the extent of advance payments, he is not the owner.

A fee-simple title exists where the ownership is absolute. It imports the right of property and possession. It signifies the use in perpetuity,—the power to hold or sell. It is an interest of which the owner cannot be divested without his consent.

The underwriter must have notice of any change in title that lessens the estate of the insured. Such changes as increase the insured's estate will not cause forfeitures.

When the policy only stipulates against alienation and change of title, there will be no forfeiture on account of real-estate mortgages. It has been held that a chattel mortgage is such increase of hazard as will avoid the policy.

A person holding a contract of sale, and in possession, is sole and unconditional owner.

A levy under an execution will render the insurance void when there is a change of possession. A seizure of chattels by writ of attachment is such change in the situation and circumstances of the risk as to discharge the insurer.

Any one may insure who has such interest in, or such relations to, the property that its destruction by fire will occasion him loss.

One may insure the property committed to his care as agent, trustee, bailee, or carrier, irrespective of the fact that its destruction will result in no loss to him personally.

When one insures, for the benefit of another, property for which he is in some manner charged, but in which he has no personal interest, his character as trustee, agent, or bailee must always be represented.

A builder may insure the materials supplied and labor expended in construction. He may also insure his accrued profit in the contract under which his operations are conducted. When a builder, by the

terms of his contract, is required to complete a structure within a stipulated time (and, in the event of failure to do so, is made liable for damages), he may protect himself against such liability so far as it may be caused by fire. Losses of this character are more in the nature of uses and rents, and may be suitably provided for under a policy expressing specifically the intention of the parties.

Both the mortgagor and the mortgagee have insurable interests. One extends to the full value of the property, while the other is limited to the amount of the debt which the mortgage secures.

The insured must declare to the insurer his interest in the property covered by the policy, if such interest be less than sole and unconditional ownership.

It will be found generally that the ownership has changed when conveyance of title will be compelled, in an action for specific performance.

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CHAPTER IV.

PAYMENT OF PREMIUM.

- § 86. Policy will be Void without a Consideration.
- 87. When Policy Acknowledges Receipt of Premium the Insurer cannot Plead Nonpayment as a Defense.
- 88. Premium must be Paid as Stipulated.
- 89. Agents having Authority Only to Take Applications cannot Waive Payment of Premium.
- 90. When Payment to the Broker is Payment to the Company.
- 91. When Default in Payment of Note Given for the Premium will Void the Insurance.
- 92. The Maker of the Note must Seek the Payee, When no Place of Payment is Designated.
- 93. When the Policy is Suspended during the Nonpayment of the Premium.
- 94. Premiums must be Paid in Money.
- 95. Conclusions.

§ 86. The Policy will be Void without a Consideration.

The payment of the premium is to the vitality of the insurance contract what caloric is to steam, or steam to the action of an engine. It is a *sine qua non*. The obligation of the insurer to pay a loss must rest upon a consideration, but the premium need not necessarily be paid in advance. Credit may be, and frequently is, given. This has often occurred under circumstances of much doubt as to the intention of the parties, and hence has been a frequent cause of litigation. When the policy provides that there shall be no liability for loss unless the premium has been actually paid, payment is a condition precedent, and performance must be had, or waiver shown.¹ What conduct on the part of the company, or its

¹ Dale v. Insurance Co., 95 Tenn. 38, 31 S. W. 266; Wall v. Insurance Co., 36 N. Y. 157; Schwartz v. Insurance Co., 18 Minn. 448 (Gil. 404); Flint v. Insurance Co., 8 Ohio, 501; Patch v. Insurance Co., 44 Vt. 481; Robert v. Insurance Co., 1 Disn. (Ohio) 355; Attorney General v. Life Ins. Co., 80 N. Y. 152; Mason v. Insurance Co., 10 W. Va. 572; Security Life Insurance & Annuity Co. v. Gober, 50 Ga. 404; Southern Mut. Life Ins. Co. v. Taylor, 10 Ins.

agents, will constitute waiver, will be for the jury to determine, under proper instructions from the court. If the agent with whom the insured deals has been theretofore, in the course of their business relations, accustomed to deliver the policies, and collect the premiums at his convenience, or at stated periods, as on the beginning of the month, a waiver of payment in advance will be presumed.² But the custom of the agent in dealing with other persons cannot be shown, to create a presumption of waiver, for credits are frequently influenced by independent considerations.³ There will often be presented questions of expediency, while the financial responsibility of the insured, and his reputation in respect to the prompt payment of debts, will always be important matters affecting credit. If, therefore, waiver is predicated on custom, it can be only such custom as may be shown to have existed between the agent and the insured. When the insurer, or its agent, either by words or acts, fairly indicates to the insured that it is not intended to insist on the condition of the policy in regard to prepayment of the premium, a jury will be justified in finding the condition waived. Where the policy was sent to the insured and nothing said concerning the prepayment of the premium, it was held that a short credit was implied.⁴

In a recent case decided by the supreme court of Iowa,⁵ it was shown by the evidence that the plaintiff held a policy for \$2,000 in the defendant company, expiring on the 27th day of August, 1888, and that about 10 days before its expiration the plaintiff met the defendant's agent, one Moore, and, reminding him that his policy would soon expire, requested that it be renewed, which the agent agreed to do. Nothing was said about the premium. The renewal certificate was never issued, and the premium never paid, nor was

Law J. 208; *Bigelow v. Assurance Ass'n*, 123 Mass. 113; *Moore v. Insurance Co.*, 90 Iowa, 636, 57 N. W. 597; *Bloom v. Insurance Co. (Iowa)* 62 N. W. 810; *Union Cent. Life Ins. Co. v. Chowning* (Tex. Civ. App.) 28 S. W. 117.

² *Ball & Sage Wagon Co. v. Aurora Fire & Marine Ins. Co.*, 20 Fed. 232; *O'Brien v. Insurance Co.*, 22 Fed. 586; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; *Miller v. Insurance Co.*, 12 Wall. 285, 303; *Manhattan Life Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280.

³ *Phenix Ins. Co. v. Munger*, 49 Kan. 178, 30 Pac. 120.

⁴ *Boehen v. Insurance Co.*, 35 N. Y. 131.

⁵ *Zigler v. Insurance Co.*, 82 Iowa, 569, 48 N. W. 987.

payment offered, until after the fire, which did not occur until some months later. The court said: "Passing the question of Moore's authority to waive conditions in the policy, we inquire whether it is shown that he did waive the condition of this policy as to the payment of premium. There was nothing in the words of this interview to warrant such a conclusion. Plaintiff simply expressed the wish that he would attend to the renewal, which he [agent] said he would do. There was no mention of premium, nor the time of its payment. Plaintiff's contention is that this interview, considered in the light of their previous mode of doing this kind of business, shows an agreement as alleged. It does not appear that Mr. Moore ever waived any of the conditions of the policy held by the plaintiff, or that he ever extended to plaintiff time for payment of premiums. His habit was to write renewals, take them to the plaintiff, and get his money, but not to waive conditions, or extend credit for premiums. It is probable that plaintiff expected Mr. Moore to bring him a renewal of his policy and get the premium, and that Mr. Moore intended to do so; but this expectation and intention do not, in the absence of the payment of the premium, or an agreement for its payment, constitute a renewal of the policy.⁶ There was no waiver, and therefore there could be no renewal without payment of the premium; and, if Mr. Moore failed to bring the renewal, the plaintiff must have tendered the premium, before he would be entitled to renewal. If, under these facts, the defendant was seeking to recover the premium from the plaintiff, it would be a sufficient answer that it had not made a renewal. It is an equally sufficient answer to plaintiff that he did not pay the premium. It will be observed that the question we are considering is not Moore's authority to waive conditions in the policy, but whether he did in fact waive the condition as to the payment of the premium."

§ 87. When Policy Acknowledges Receipt of Premium, the Insurer cannot Plead Nonpayment as a Defense.

If the policy which has been delivered expresses an acknowledgment on the part of the company of having received the premium,

⁶ O'Reilly v. Assurance Corp., 101 N. Y. 575, 5 N. E. 568.

although in fact the premium has not been paid, the insurer will be estopped from setting up the nonpayment as a forfeiture.

In *Basch v. Humboldt Mut. Fire & Marine Ins. Co.*,⁷ the policy, in formal terms, acknowledged the receipt of the premium, but which defendant alleged had in fact never been paid; and as the policy, by its terms, made such payment a condition precedent, the insurer claimed that it was not liable for the loss. Beasley, C. J., in stating the opinion of the court said: "This policy, executed by the president and secretary of the company, contains a formal acknowledgment of the payment of the premium in question; and in my opinion this should prevent the defendant from averring or showing nonpayment, for the purpose of denying that the contract ever had any legal existence. What does this receipt, in connection with its delivery, import, if it does not mean that the payment of the premium is conclusively admitted, to the extent that such payment is necessary to give validity to the contract? Unless this be the meaning, it serves no legal office, for it does not mean that the money has been actually received. It is true that there is an express declaration that the policy is to have no effect unless the premium shall have been paid, but in this same instrument is an equally express declaration that the act upon which the contract is to become efficacious has been done. Such an acknowledgment appears to be analogous and equivalent to the acknowledgment of the receipt of a valuable consideration in a conveyance, operative by force of the statute of uses, being always considered as conclusive for the purpose of giving legal force to the transaction. This policy purports to have an effect immediately on delivery, founded on a paid-up consideration. It does not seem competent for the promisor to prove that the acknowledgment is not true, and that the contract never had any existence. I think that, when the assured received this policy, he had a right to presume, either that the agent had settled the premium with the company, or that they, by their receipt, intended to relinquish the clause requiring prepayment. The usual legal rule is that a receipt is only *prima facie* evidence of payment, and may be explained; but this rule does not apply when the question involved is not only as to the fact of payment, but as to the

⁷ 35 N. J. Law, 429, 5 Benn. Fire Ins. Cas. 421.

existence of rights springing out of the contract. With a view of defeating such right, the party giving the receipt cannot contradict it. An acknowledgment of an act done, contained in a written contract, and which is required to put it in force, is conclusive against the party making it, as any other part of the contract, and cannot be contradicted or waived by parol."

This decision is supported by the courts of Illinois and Indiana.⁸ In the case last cited a contract to insure was made by parol two days before the fire occurred, but the policy was not made out and delivered to the insured until after the loss. The premium was then remitted to the Home Company, which afterwards, when learning the facts in the case, offered to return it, which offer was declined by the insured. The court said, somewhat significantly it may be: "We are not required to decide what the rights of the parties would have been in case there had been no delivery of the policy, or in case the agent had failed to give the company credit and remit in usual course." It does, however, clearly appear, by the facts recited in the opinion, that the agent, in his parol contract with the insured, agreed that he would make out and deliver to the latter a policy in the Home Company for the amount stated, and that the premium should be settled by the agent receiving credit on the books of the insured, to whom, it seems, he owed money. While the case, therefore, differs in certain important respects from that of *Basch v. Insurance Co.*, here under consideration, the opinion of the court may be fairly regarded as substantially in support of the doctrine laid down in *New Jersey*.

From the statement of the law as given by Justice Beasley we offer our qualified dissent. We think its logic is faulty, and cannot be well sustained by sound legal principles. Why the common rule, making a receipt only *prima facie* of payment, should be changed in respect to an insurance contract, the learned judge has failed to make apparent. In that case, had suit been brought by the insurance company to collect the premium, presumably the court would have held that the ordinary rule of law applied; that the acknowledgment of the receipt of premium was only *prima facie* that it had been paid,—and that the company would have been allowed to show that the money

⁸ *Provident Life Ins. Co. v. Fennell*, 49 Ill. 180; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118, and 17 Ins. Law J. 12; *Consolidated Real-Estate & Fire Ins. Co. v. Cashow*, 41 Md. 59.

was still due. Why, therefore, the formal receipt incorporated into the policy should signify more in one relation than in another,—why it should be only *prima facie* as to payment, and conclusive as to a performance of the condition,—the court has failed to satisfactorily establish. The results reached in this case could have been secured without the strained construction, and what appear to us violent assumptions, to which the learned court has found it necessary to resort. When a policy is delivered, as in the *New Jersey* case, without the payment of the premium, a credit may be presumed, which carries with it an implied waiver of the condition making the validity of the policy to depend on payment. It is sometimes more important, perhaps, that courts should pursue right methods, than that the right should be attained as a final result. The mind of one, aided by inspirations, may find the truth by tortuous paths, while another will lose the way, and be lost in labyrinths of error. The judicial pathfinder should therefore have due regard for those less fortunate in respect to legal acumen, who are to follow in his footsteps, and be guided by the rules of interpretation he has approved.⁹

In *Miller v. Life Ins. Co.*¹⁰ the premium was to be part cash, and for the remainder two notes were given. The insured told the agent to call on his partner for the cash part of the premium, and that policy might be sent to him (the insured). The notes were executed as agreed upon, but the insured's partner refused to pay the cash when called upon by the agent to do so. The insured fell sick, and the agent wrote him, inclosing the two notes, and requesting a return of the policy, but before this letter could reach the insured he died. The policy recited that the consideration had been received partly in cash, and partly by note. With the policy there was also delivered to the assured a receipt, which contained a printed notice as follows: "Agents may not deliver policies until the premiums are received, as no policy is in force until paid for." The policy

⁹ *Michael v. Insurance Co.*, 10 La. Ann. 737; *Sheldon v. Insurance Co.*, 26 N. Y. 460; *Dircks v. Insurance Co.*, 34 Mo. App. 31; *Bradley v. Insurance Co.*, 32 Md. 108; *Western Assur. Co. v. Provincial Ins. Co.*, 5 Tupper (Can.) 190; *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137, 11 Ins. Law J. 892; *Flint v. Insurance Co.*, 8 Ohio, 501; *Ryan v. Rand*, 26 N. H. 12; *Mutual Life Ins. Co. v. Davidge*, 51 Tex. 244.

¹⁰ 12 Wall. 285.

itself, on its margin, had printed a plain notification that agent was not authorized to alter, change, or waive any of its conditions. It was held that the agent had power to waive the cash premium, and that the delivery of the policy, without an actual payment of that portion of the premium which was to be paid in cash, raised a presumption that credit was intended, and that where credit is intended the policy will not be forfeited, although the premium is never paid. The court here expresses an important rule of law, which does not appear to be generally understood, and concerning which other courts have held differently. To state the principle affirmed with greater amplitude,—when the policy provides that the premium must be paid before the liability of the insurer will attach, if the provision is waived by an agreement on the part of the agent to give credit, the right of the insurer to declare a forfeiture on account of the premium not being paid at the time agreed upon, or at any subsequent time, will not exist.¹¹ The waiver is irrevocable, and the right to insist on an enforcement of the condition is irretrievably lost.¹² With the express agreement between the parties in regard to credit, there is coupled an implied agreement that the condition of the policy, making its validity depend upon the actual payment of the premium, shall be a nullity, and that the insurer will thereafter rely on the collection of the premium, and not on being relieved, under the terms of the policy, from the payment of a loss, should one occur. The case, of course, will be otherwise where the policy provides that the premium may be paid by a note, and that the insurer will be liable for any loss that may occur under the policy before the maturity of the note; but if, at maturity, the insured fails to pay, then the liability of the insurer shall be suspended during the term of such default. In a case of this kind there is no waiver involved. The credit is contemplated and arranged for in such a manner as to preserve the integrity of the contract, and at the same time to afford to the assured the accommodation desired.

¹¹ *Phenix Ins. Co. v. Dungan*, 37 Neb. 468, 55 N. W. 1069; *Kerlin v. Acc. Ass'n*, 8 Ind. App. 628, 36 N. E. 156; *Krause v. Assurance Soc.*, 99 Mich. 461, 58 N. W. 496 (see authorities there cited); *Planters' Ins. Co. v. Ray*, 52 Miss. 325; *Wheeler v. Insurance Co.*, 131 Mass. 1, 10 Ins. Law J. 354; *Bouton v. Insurance Co.*, 25 Conn. 542; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345.

¹² When a defense is once waived, it cannot be recalled. Waiver is irrevocable. *Illinois Live-Stock Ins. Co. v. Baker*, 153 Ill. 240, 38 N. E. 627.

§ 88. Premium must be Paid as Stipulated.

In *Bradley v. Potomac Ins. Co.*¹³ the policy provided that the company should not be liable for loss unless the premium was actually paid, and that, unless the premium was paid within 15 days from its date, it should be void. A fire occurred within 15 days, and before the premium was paid. Payment was tendered, however, before the expiration of the 15 days, and loss claimed. Held, there could be no recovery.

The doctrine declared in *Basch v. Humboldt Ins. Co.* is materially modified in *Wood v. Poughkeepsie Mut. Ins. Co.*, and in *Goit v. National Protection Ins. Co.*¹⁴ where it was held that parol evidence was admissible to show that credit was not intended; that the policy was only delivered for examination, with a distinct understanding that, if accepted, the premium should be paid without delay. And as seen in *Bradley v. Potomac Ins. Co.*, supra, where the policy provides that the premium must be paid within a specified time, default in that respect will be at the insured's peril. The provision for an avoidance and the provision for credit being both a part of the contract, there is no room for construction, and no grounds for waiver. The policy immediately becomes operative, and so continues until the time expires within which the premium must be paid; and, if the insured is then found in default, an avoidance results. An agent having real or apparent authority to waive the prepayment of the premium, and by his conduct leading the insured to believe that such is his intention, there will be no forfeiture, although the premium continues unpaid when the loss occurs; but the burden of proof will be on the party seeking to recover, that the agent had been held out by his principal as having authority in the matter.

A delivery of the policy without payment of the premium is presumptive that a credit is intended.¹⁵

¹³ 32 Md. 108.

¹⁴ 35 N. J. Law, 429, 5 Benn. Fire Ins. Cas. 421; 32 N. Y. 619; 25 Barb. (N. Y.) 189.

¹⁵ *Washoe Tool Manuf'g Co. v. Hibernia Fire Ins. Co.*, 66 N. Y. 613; *Little v. Insurance Co.*, 38 Ohio St. 110; *Universal Fire Ins. Co. v. Block*, 109 Pa.

§ 89. Agents Having Authority Only to Take Applications cannot Waive Payment of Premium.

An agent with power only to solicit risks, take applications, and forward them for the examination or approval of the general agent or secretary of the company, will not be presumed as having authority to waive the prepayment of premium, unless it is shown that credits are given in the usual course of the business to which his duties relate.¹⁶

§ 90. When Payment to the Broker is Payment to the Company.

In *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*¹⁷ the policy provided that it should not become effective until actual cash payment of the premium had been made to the office of the company. That case may be briefly stated as follows: A. applied to B. for insurance, who undertook to procure the required policies through C., and C. found it necessary or convenient to apply to D. B., C., and D. were all brokers. The latter obtained the insurance desired, from a duly-authorized agent of the company, and from him received the policies, which were delivered to A. through the hands, respectively, of C. and B. A. paid the premium to B., and he in turn paid it to C., and by him it was kept. The court held that as the brokers were the agents of A., and not of the company, there had been no payment of the premium, and, a loss having occurred, the company was not liable.

There has been a good deal of disagreement among the courts in regard to the proper status of an insurance broker. Sometimes he is

St. 535, 1 Atl. 523; *Hodge v. Insurance Co.*, 33 Hun, 583; *Frankle v. Insurance Co.*, 12 Ins. Law J. 614; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869; *Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924; *Brownfield v. Insurance Co.*, 35 Mo. App. 54.

¹⁶ *Elkins v. Susquehanna Mut. Fire Ins. Co.*, 113 Pa. St. 387, 6 Atl. 224; *Farnum v. Insurance Co.*, supra; *Kirkman v. Insurance Co.*, 90 Iowa, 457, 57 N. W. 952; *Dryer v. Insurance Co. (Iowa)* 62 N. W. 798; *Hartford Fire Ins. Co. v. Small*, 14 C. C. A. 33, 66 Fed. 490.

¹⁷ 100 Pa. St. 137.

recognized as the agent of the insured, and again as the agent of the insurer. In *Indiana Ins. Co. v. Hartwell*¹⁸ a conclusion was reached that the broker was the agent of the party from whom he received compensation for his service, irrespective of by whom he may have been employed. The application of this rule will always be uncertain, without a decree of the court declaring the ownership of the funds from which the broker receives his fee. The insured pays his premium to the broker, who deducts his commissions, and passes over the remainder to the insurer. When this occurs, who is it that pays the broker, —the insured or the company,—will the courts decide? It will be observed that in a very large proportion of cases the broker is employed by the person who seeks insurance. His compensation is so well understood, and fixed by common custom, which in rare instances may be modified by local usage or special contract, that, when he receives from the insured the premium he is required to pay, it is often not a matter of agreement with any one how much of the sum so received he may retain for his services, and how much he must hand over to the underwriter as his proper share of the total sum paid by the person to whom the policy was issued. It is not, therefore, always easy to understand, as declared by the Indiana court, how it is that the broker receives his fee from the insurer. The money actually coming into the hands of the broker as his fee may never have been in the possession of the insurer, and in a large majority of cases such will be the fact, and, in the hands of the broker, could not be sued for, nor would it be subject to attachment in suit against the insurer. The circumstances of each case will frequently be, no doubt, a surer guide than any formulated rule, in fixing the relations of the broker to the parties for whom, or between whom, he acts. In many of the adjudicated cases the broker has been held to be the agent of the company for the delivery of the policy and receiving of the premium, and that his agency then terminates;¹⁹ that subsequent notice to him of other insurance, incum-

¹⁸ 123 Ind. 177, 24 N. E. 100.

¹⁹ *Ruggles v. Insurance Co.*, 114 N. Y. 415, 21 N. E. 1000; *Cahill v. Insurance Co.*, 5 Biss. 211, Fed. Cas. No. 2,289; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Newark Fire Ins. Co. v. Sammons*, 110 Ill. 166; *Royal Ins. Co. v. McCrea*, 8 Lea (Tenn.) 531, 11 Ins. Law J. 508; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207; *Universal Fire Ins. Co. v. Block*, 109 Pa. St. 535, 1 Atl. 523, and 15 Ins. Law J. 219; *Riley v. In-*

brance, etc., on the part of the assured, or of notice of cancellation on the part of the insurer, will not bind either party.

In *Wilber v. Williamsburgh City Fire Ins. Co.*²⁰ It was held that the broker who procured the insurance was the agent of the insured, and not of the company. The essential facts in that case may be briefly stated as follows:

The plaintiff's assignors (Leslie & Co.) obtained a policy from the defendant company through brokers, Sands & Flynn, to whom the premium was paid, and by whom it was kept. In due time the defendant company notified the insured that the premium had not been paid. On receiving such notice, they wrote defendant that: "We hold the receipt for the premium on our policy, and have paid the money to Mr. Sands on the same; therefore shall hold you responsible, in case of fire, until the expiration of the policy. If Mr. Sands has not paid you any money, we cannot help it, as we looked upon him as your agent." On the same day defendant replied, calling attention to a condition of the policy which reads as follows: "If any broker, or other person than the assured, has procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the insured, and not of this company, in any transactions relating to this insurance." The defendant then indorsed on its office records the cancellation of the policy, and thus the matter rested until a fire occurred some months afterwards, on account of which the property described in the policy was damaged or destroyed. The New York court of appeals was of the opinion that it was competent for the parties to stipulate in the policy that a broker who procured the insurance to be taken should be considered, in relation to that transaction, as the agent of the insured, and, it having been so stipulated in this instance, the payment of the premium by the assured to the

insurance Co., 110 Pa. St. 144, 1 Atl. 528, and 15 Ins. Law J. 466; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149, 4 Atl. 8, and 16 Ins. Law J. 47; *Martin v. Insurance Co.*, 101 N. Y. 498, 5 N. E. 338.

The single fact that the company delivers to a broker its policy, and pays him a commission out of the money which he receives from the insured, is not conclusive of agency. *Security Ins. Co. v. Mette*, 27 Ill. App. 324.

If employment imports agency, the broker cannot be the agent of the insurer, where it appears that he has given the broker no authority to contract in his behalf. *Continental Ins. Co. v. Allen*, 26 Ill. App. 576.

²⁰ 122 N. Y. 439, 25 N. E. 926.

broker was only placing it in the hands of his own agent, and that the defendant company was not bound.²¹

The premium will be due at the time the insurance begins, and must be paid then, and in money, unless some other time and manner of payment are agreed upon. Usually it will be sufficient to offer, in settlement of the premium, currency, bank drafts, checks, or any of the customary and convenient means of payment, unless objected to, in which event specie or legal-tender funds will be required.²²

§ 91. When Default in Payment of Note Given for the Premium will Void the Insurance.

When a note is given for the premium, and the policy contains a clause that unless it is paid at maturity the insurance will be void, a default in making payment will be fatal.

In *Shakey v. Hawkeye Ins. Co.*²³ the policy stipulated that, if the note given for the premium should not be paid when due, the liability of the company should cease, but that it would be reinstated in case the note was voluntarily paid before suit; that the bringing of suit should operate as an absolute cancellation of the policy, and the whole premium should be considered as earned and payable; that the commencement of the suit should be notice that the liability of the company had terminated; further, that such liability should not be revived, should the note be collected by legal proceedings. The court held that the commencement of suit was sufficient notice of the termination of the policy, and that the collecting of the note did not waive the forfeiture; that the parties were competent to so contract.*

²¹ *Rohrbach v. Insurance Co.*, 62 N. Y. 47; *Alexander v. Insurance Co.*, 66 N. Y. 464.

Broker agent for the company in delivering the policy and collecting the premium. *Gude v. Insurance Co.*, 53 Minn. 220, 54 N. W. 1117; *Arthurholt v. Insurance Co.*, 159 Pa. St. 1, 28 Atl. 197.

²² *Currier v. Insurance Co.*, 53 N. H. 538; *Tayloe v. Insurance Co.*, 9 How. 390; *Kerlin v. Association*, 8 Ind. App. 628, 36 N. E. 156; *Krause v. Assurance Soc.*, 99 Mich. 461, 58 N. W. 496; *Manhattan Life Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280.

²³ 44 Iowa, 540; *Shultz v. Insurance Co.*, 42 Iowa, 239, 5 Ins. Law J. 354.

* *Shultz v. Insurance Co.*, 42 Iowa, 239, 5 Ins. Law J. 354.

The same court held with no less inflexible rigor to the literal enforcement of the policy condition in the case of *Greeley v. Iowa State Ins. Co.*²⁴ The defendant was a mutual insurance company, and had assessed its premium notes. The plaintiff, who was a member of the company, was absent in Europe when the notice of the assessment had been sent through the mails to his usual address. The plaintiff, on going away, left an agent in charge of his business. This fact not being understood by the postmaster, he forwarded the letter containing the notice of assessment to the assured, in Europe; and, before it reached plaintiff and the money could be returned, the time (30 days) in which assessment was required to be paid had expired; and, a loss occurring before the assessment was paid, the court held that the plaintiff could not recover; that the failure to receive the notice in time was the misfortune of the assured, but did not relieve the forfeiture.

This case is important only as it illustrates the general rule of law that contracts must be performed as they are made. When rigid in their character, courts cannot give them elasticity, even to save hardship and wrong. Misfortune and accident, even when the best intentions are shown, will not excuse performance, or save forfeiture.²⁵

Where the policy contained a condition that the company should not be liable for any loss when the premium note was wholly or in part past due and unpaid, it was held, under such circumstances, in the absence of waiver, that the liability of the company was suspended by the terms of the contract while the default continued. Held, too, that "waiver will not be inferred from an acceptance by the company of a part of the premium note after maturity, nor for an extension of the time of payment, nor from a statement of the secretary of the company that the company was liable under the laws of the state, notwithstanding the default in payment."²⁶

When a note is given for the premium, and the continued validity

²⁴ 50 Iowa, 86.

²⁵ *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877, and 8 Ins. Law J. 691; *Forest City Ins. Co. v. School Directors*, 4 Ill. App. 145, 8 Ins. Law J. 879.

²⁶ *Garlick v. Insurance Co.*, 44 Iowa, 553; *Carlock v. Insurance Co.*, 138 Ill. 210, 28 N. E. 53; *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 49 N. W. 217, and 21 Ins. Law J. 618.

Premium note may be collected, although by the terms of both note and policy

of the policy is by its terms made conditional upon the payment of the note at maturity, a failure on the part of the insured to respond at the time mentioned will relieve the company from any duty to pay a loss.²⁷ If, however, there is no provision in the note or policy avoiding the insurance in case the insured defaults in his payment, the obligation of the company will continue, and in the event of a loss it will be no defense for the insurer to say that the promise to indemnify is without consideration.²⁸

When a note is given to the agent for the premium, and the agent accounts to the company, retaining the note as his own property, or when the company accepts a note for the premium, that does not

the company is relieved from liability during the period of default. *McEvoy v. Insurance Co.*, 46 Neb. 782, 65 N. W. 888.

A part of the premium note was unpaid at the occurrence of a loss. Payment was immediately made, without giving notice of the loss. As soon as the company was informed of the fire, it returned the money and denied liability. It was held that the failure of the insurer to insist on payment of the note when due did not constitute a waiver of the forfeiture. *Dale v. Insurance Co.*, 95 Tenn. 38, 31 S. W. 266; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. 417; *Bloom v. Insurance Co. (Iowa)* 62 N. W. 810; *Cohen v. Insurance Co.*, 67 Tex. 325, 3 S. W. 296; *Wall v. Insurance Co.*, 36 N. Y. 157; *Shultz v. Insurance Co.*, 42 Iowa, 239; *Williams v. Insurance Co.*, 19 Mich. 451; *Joliffe v. Insurance Co.*, 39 Wis. 111; *Gorton v. Insurance Co.*, Id. 121; *Kirk v. Insurance Co.*, Id. 138.

²⁷ *Gorton v. Insurance Co.*, 39 Wis. 121, 5 Ins. Law J. 350; *Shakey v. Insurance Co.*, 44 Iowa, 540; *Shultz v. Insurance Co.*, 42 Iowa, 239, 5 Ins. Law J. 354; *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877, and 8 Ins. Law J. 691; *Williams v. Insurance Co.*, 19 Mich. 451; *Wall v. Home Ins. Co.*, 36 N. Y. 157; *Muhleman v. Insurance Co.*, 6 W. Va. 508; *Thompson v. Insurance Co.*, 104 U. S. 252; *American Ins. Co. v. Leonard*, 80 Ind. 272. See, also, *American Ins. Co. v. Henley*, 60 Ind. 515; *Southern Mut. Ins. Co. v. Taylor*, 33 Grat. 743, 10 Ins. Law J. 208; *Moore v. Insurance Co.*, 90 Iowa, 636, 57 N. W. 597; *Union Cent. Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 455, 28 S. W. 117; *Manhattan Life Ins. Co. v. Le Pert*, 52 Tex. 504; *Ashbrook v. Insurance Co.*, 94 Mo. 72, 78, 6 S. W. 462; *Fowler v. Insurance Co.*, 116 N. Y. 393, 22 N. E. 576; *New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Willcuts v. Insurance Co.*, 81 Ind. 300; *Ewald v. Insurance Co.*, 60 Wis. 431, 19 N. W. 513; *Hudson v. Insurance Co.*, 28 N. J. Eq. 167; *Marston v. Insurance Co.*, 59 N. H. 92; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *Dale v. Insurance Co.*, 95 Tenn. 38, 31 S. W. 266.

²⁸ *Trade Ins. Co. v. Barraciff*, 45 N. J. Law, 543; *Dwelling-House Ins. Co. v. Hardie*, 37 Kan. 674, 16 Pac. 92.

refer to the policy, and is in no manner made a part thereof, such note is payment; and should the maker afterwards become insolvent, and fail to pay, such default will not impair the validity of the insurance.²⁹

§ 92. The Maker of the Note must Seek the Payee When No Place of Payment is Designated.

Where the continued validity of the policy is conditioned upon the payment at maturity of the premium note, and no place is designated where the note can be found and payment made, the authorities are not wholly in accord as to the rights of the parties, should a loss occur after default in payment. This question was considered by the supreme court of Michigan in *McIntyre v. Michigan State Ins. Co.*³⁰ The plaintiff there contended that it was no fault of his that payment of the note had not been made; that no particular place was mentioned where it would be deposited; that it had not been presented, nor payment demanded. No notice, even, had been given where it could be found. No offer of payment, he insisted, on his part, was necessary to prevent an avoidance or suspension of the policy; that it was the duty of the holder of the note to demand payment at plaintiff's residence. The court said: "This is not a tenable position. The doctrine indicated relates to the case of indorsees whom, as being under engagement for the debts of others, the law so far favors as to require some preliminary effort to collect from the party personally liable. The reason of this rule does not fit the case of maker and payee, and hence the rule itself does not apply. As between the latter parties, the maker is bound to seek the payee and offer payment. * * * The instrument might have been drawn payable at plaintiff's residence, but he did not elect to require it.

²⁹ *Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543, 13 Ins. Law J. 190; *Contra, McIntyre v. Insurance Co.*, 52 Mich. 188, 17 N. W. 781, and 13 Ins. Law J. 216. See, also, in support of text, *Elkins v. Insurance Co.*, 113 Pa. St. 386, 6 Atl. 224, and 16 Ins. Law J. 78; *Pennsylvania Ins. Co. v. Carter* (Pa. Sup.) 11 Atl. 102; *East Texas Fire Ins. Co. v. Mims*, 4 White & W. Civ. Cas. Ct. App. § 1324; *Pitt v. Insurance Co.*, 100 Mass. 500; *Krause v. Assurance Soc.*, 99 Mich. 461, 58 N. W. 496.

³⁰ 52 Mich. 188, 17 N. W. 781, and 13 Ins. Law J. 216.

He made it payable generally, and the form of undertaking expresses the understanding. He bound himself to seek the payee or holder, and mere possession of the money at his house, and the will to pay it, could avail him nothing in point of law. His undertaking went further. No demand on him by the defendant was necessary to make the note either due or suable. Mere nonpayment was default, and no facts arose to excuse it."³¹

The court of appeals of Kentucky, in *Blackerby v. Continental Ins. Co.*,³² in the urgency of their desire to give effect to the contract and to save forfeiture, which is always repugnant to the law, has given us an example of constructive ingenuity and judicial differentiation. The plaintiff had given his note, by which he promised to pay the defendant company the sum due for the premium on a policy which had been issued and delivered to him. The note designated no place where payment could be made, and contained a provision that, unless paid at maturity, the policy should become void. On the face of the note was printed the address of the home office of the company, in New York. The policy also provided for its avoidance in case of the nonpayment of the note, but that in such case liability could be revived on subsequent payment, and the written consent of the superintendent of the Western department, at Chicago. The court held that it was not incumbent on the plaintiff, for the purpose of making payment, to seek the defendant at its office at New York or Chicago; that as the Continental Insurance Company had given the plaintiff, Blackerby, no notice at what place the note was deposited, and could be found for payment, in the state of Kentucky, no forfeiture would result, although the plaintiff failed to pay the note when due, or at any other time. The court said: "If the insured can show a reasonable excuse for nonpayment of the premium, based upon the conduct of the insurer, the policy will not be regarded as forfeited. In this instance neither the policy nor the application of the insured fixed a place for the payment of the premium, or named the person to whom it must be paid. The appellant is a citizen of this state. The appellee is a foreign company, with its principal office, as the policy shows, in New York City, and branch office for the Western department in Chicago, Ill., and a local agent in this

³¹ *Thompson v. Insurance Co.*, 104 U. S. 252.

³² 83 Ky. 574; 15 Ins. Law J. 756.

state. It was urged that under these circumstances the appellant, to avoid a forfeiture of his policy, was bound to know that his note was at the Chicago office, and to make payment there. We see no reason, however, why from the same contract the insured would not have had a better right to suppose that it must be paid at the New York office." And the court therefore reaches the conclusion that as the note did not name any place where, or person to whom, payment could be made, the insured was excused, and no default had occurred. While this construction of the Kentucky court may seem somewhat strained, its reasoning is sustained by constant recognition of sound legal principles; and, while we may differ as to the correctness of the results arrived at, all will agree that "substantial justice" has been done, and that there are "no moralities shrieking aloud." While offering this tribute to the honesty and intelligence of the Kentucky court of appeals, it appears to us very clear that a default did occur on a failure to pay the note at maturity; that it was the duty of the insured to find the payee at either its office in New York or Chicago. State lines form no barriers to commerce, and the trouble and expense of sending a draft to Chicago or New York would have been no greater, and caused but a few days longer delay, than if payment had been required at the nearest metropolis of the plaintiff's own state. But, even if the case were otherwise, it would not offer a valid excuse for setting aside important contract stipulations. If there were any inconvenience or hardship incident to payment in a distant city, it was a matter that could have been provided for when the insurance was effected; or the undertaking might have been declined.

§ 93. When the Policy is Suspended during the Nonpayment of the Premium.

When notes are given for the premium, the policy frequently contains a clause providing that if payment is not made at maturity the liability of the company under the policy shall cease, and so continue during the term of default, but that when payment of the note is made the company shall again become liable during the remainder of the term for which the policy is written. Under this class of contracts, there will be no liability for a loss occurring while the note remains unpaid after it becomes due, and an acceptance of the pre-

mium after loss will be no waiver of the defense which has come to exist on account of the default.²³ There will always exist one important reason, and frequently two, why payment of the note may be offered and accepted subsequent to a fire without in any manner changing the rights of the parties in relation to the loss. These reasons refer primarily to business faith, and the duty of all persons to perform their engagements, whether to do so will result in loss or gain. Then, too, if the loss is only partial the insured will have a direct interest in paying the premium, so that the policy will be restored for the protection of that portion of the property covered which has not been destroyed. To illustrate, let us suppose a policy issued to Brown in the sum of \$1,500 for three years. Of this, \$1,000 covers on frame dwelling, and \$500 on frame barn. For the whole premium—say, \$15—a note is given, payable in one year. In both the note and the policy the condition is plainly expressed that unless the note is paid when due the liability of the company shall be suspended, and so remain until payment is made. Now, it will be obvious that the insurer has carried the risk for an entire year without any compensation. During that period it would have been liable for any loss within the terms of the policy, had one occurred. Common honesty, therefore, requires that the insured should pay the note, for he has had the benefit of one year's insurance. The fact that the property has burned while the policy was suspended affords him no indemnity; does not lessen his obligations to pay, under the terms of his contract, for the protection he has enjoyed for a whole year, and which would have continued except for his own fault in neglecting to pay the note. But, again, suppose the barn (insured for \$500) only had burned. By making payment of the premium, the policy will be revived as to the \$1,000 covering on dwelling. Brown has a right to make such payment, and demand that his insurance on the property not destroyed shall be restored, and the company, in accepting payment, does not waive its right to insist on any forfeiture that has come to exist because of the previous default; and the

²³ *Continental Ins. Co. v. Boykin*, 25 S. C. 323; *Continental Ins. Co. v. Hoffman*, Id. 327; *Currier v. Insurance Co.*, 57 Vt. 496; *Blackerby v. Insurance Co.*, *supra*; *Palmer v. Insurance Co.*, 31 Mo. App. 467; *Schimp v. Insurance Co.*, 124 Ill. 354, 16 N. E. 229.

same principle of law will apply, although suit has been commenced to enforce collection of the note.³⁴

In *Williams v. Albany City Ins. Co.*³⁵ the discussion involved a question closely analogous to the one here under consideration. The insurance was upon a schooner. A note was given for the premium, which was past due and unpaid when the loss occurred. In the policy sued on was a stipulation as follows: "In case the note or obligation given for the premium thereof, or any part thereof, be not paid at maturity, the full amount of premium shall be considered as due, and this policy become void while said past-due note or obligation, or any part thereof, remains overdue and unpaid." Within a few days after the note matured the boat was lost by reason of the perils insured against, and about a week later the note was paid, and the money accepted by the company. The court held that the insurer was not liable; that the intention of the parties was that the policy should be suspended, and not operative, during such period as the note should remain unpaid after maturity. But the court said: "Upon payment after default the policy should again take effect from the time of the payment, and continue for the balance of the period originally fixed, and by reason of such default it should only wholly be void, or cease to be capable of revival as a policy, in case the default should continue to the end of the period first fixed for the insurance. The provision, therefore, is but a stipulation, in another form of words, that the company shall not become liable for any loss which may occur during the continuance of the default." It was the opinion of the court that the condition agreed to by the parties was lawful, and in no respect obscure in its meaning, and that the acceptance of payment of the note in no way changed the relation of the parties to the suit. There was no waiver of the rights of the defendant, as it was entitled to full payment of the premium in any aspect of the case.³⁶

³⁴ *Klein v. Insurance Co.*, 104 U. S. 88; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314; *Beadle v. Insurance Co.*, 3 Hill (N. Y.) 161; *Wheeler v. Insurance Co.*, 82 N. Y. 543; *Holly v. Insurance Co.*, 105 N. Y. 487, 11 N. E. 507; *Wall v. Insurance Co.*, 36 N. Y. 157.

³⁵ 19 Mich. 451.

³⁶ *Schimp v. Insurance Co.*, 124 Ill. 354, 16 N. E. 229. The action was brought to recover on premium note for \$40. Both note and policy provided that after maturity of note, pending default in payment, the policy should

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In *North Western Mut. Life Ins. Co. v. Amerman* ³⁷ a note was given for the premium, which was past due and unpaid when loss occurred. After suit was brought, payment of the note was offered, and the money was accepted. This action on the part of the company, it was insisted, estopped it from pleading the forfeiture as a defense. The court said: "Upon the delivery of the policy and commencement of the risk, the appellee acquired a personal, vested right in the premium, as an entirety. The payment of a part of it was merely postponed, and consequently the company had a right to receive the money. But, however this may be, we are clearly of the opinion that the receiving it did not operate as a waiver of the breaches of the condition of the policy."

The case of *Joliffe v. Madison Mut. Ins. Co.* ³⁸ is sometimes referred to as opposed to the doctrine which the foregoing cases clearly affirm, but a careful examination of the provisions of the policy in that suit discloses that the rules of construction adopted by the Wisconsin court in no wise conflict with those sanctioned by Michigan and Illinois in the cases before considered. The Madison Mutual policy contained a condition as follows: "Whenever a promissory note shall be taken for the cash premium, the policy in all such cases shall be issued upon the express condition that, if said note is not paid within sixty days after the same shall become due thereafter, all the obligations of the company to the insured shall be suspended until such time as the note shall be fully paid. * * * In case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order remains unpaid after its maturity." In order to understandingly distinguish this case from that of *Williams v. Albany City Ins. Co.*, supra, proper attention should be given to the difference in the forms of the several contracts. That of the

continue suspended. It was set up in defense to the suit on note that because of the suspension of the insurance the company should be permitted to recover only a ratable proportion of the note. Held, that the policy was only voidable, on account of the default in paying the premium; that the note was an entirety, and the whole sum collectible. *Phenix Ins. Co. of Brooklyn v. Rollins*, 44 Neb. 745, 63 N. W. 46; *Curtin v. Insurance Co.*, 78 Cal. 619, 21 Pac. 370.

³⁷ 119 Ill. 329, 10 N. E. 225.

³⁸ 39 Wis. 111.

Madison Mutual, it will be observed, contained no words defining, either in terms or by implication, in what manner the rights of the company or the insured would be affected by the payment of the note after a default had come to exist. This fact the court evidently regarded of much importance, and we may fairly assume that it dominated all other considerations that influenced the conclusion reached,—that the acceptance of payment of the note after a loss was a waiver of the previous default, and made the company liable for the loss. We quote from the opinion: “Had the agreement been that in case of default the whole premium should be considered earned, and that liability of the insurer should be suspended, or the policy be void, until such premium, or note given therefor, should be fully paid, we should have but little difficulty with the question. In such cases the insurer, having earned the premium, would be entitled to receive it in any event. If paid during the life of the policy, it would revive the risk from the date of the payment, as to all of the insured property remaining at that date. If not paid during the life of the policy, the insurer would be entitled to it, and might recover it by action.”

There is a class of cases where the policies clearly show that the parties intend there shall be an avoidance when default occurs in payment of the premium note, but fail to define to what extent, and in what manner, their rights shall be affected by subsequent payment. The courts have held that the acceptance of the premium by the insurer is a waiver of its right to insist on the forfeiture.³⁹ The correctness of the legal principle here involved cannot be well questioned. While waiver is based on knowledge and intention (and the courts should be careful to confine its application within just limitations), we think, in the absence of any express agreement as to the effect of the acceptance of the premium after default, the waiver may be fairly inferred. In none of these cases does the policy provide that

³⁹ Policy stipulated for forfeiture if premium note was not paid when due. The insurer accepted part payment, without any agreement to restore the insurance. The sum paid was greater than premium actually earned at time of fire. The forfeiture was held to be waived. *Phenix Ins. Co. of Brooklyn v. Dungan*, 37 Neb. 468, 55 N. W. 1069; *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494, 20 N. W. 22; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 25 N. E. 126; *Robinson v. Peterson*, 40 Ill. App. 132.

the payment of the premium shall revive the policy for the remainder of the term, nor that in event of a default the whole premium shall be considered earned and payable. This very pregnant inquiry is then presented: By what right does the insurer receive and retain this money? It is not because it has been earned, for the right to declare the entire premium earned in a contingency could rest only on an express agreement, which is not found in these cases. It is not as the consideration for a continued and future liability, for, the property having burned, the risk has terminated. There is then only one other ground on which the insurer can justify its action in accepting the offered premium, and that is that it waives the forfeiture, and recognizes a liability for the loss.⁴⁰

In the case of *Blackerby v. Insurance Co.* there was a stipulation in the policy that, if the insured failed to pay his notes when due, the policy should be void, and the whole amount of the unpaid installments should be considered as earned. The court said: "It is well settled, however, that a condition like this one in a policy of insurance is valid, and that in case of a breach of it by the insured, without a valid excuse, the obligation of the insurer is at an end, although the premium note of the insured remains binding upon him. The parties have the right to make their own contract, and to fix its terms and conditions; and unless they are illegal, or in violation of public policy, they will be upheld. In this instance they could have agreed upon a higher rate of premium, and they had an equal right to agree that the period of time to be covered by the insurance should become shorter upon some contingency, without altering the amount of the premium. Especially would this be reasonable and just as to any contingency which the legal duty of the insured requires him to, and which he can, prevent. Any other rule would require the insurer to carry the risk, although the insured was at the same time violating the contract without excuse, and to require the company to waive its right to the premium before it could insist upon a release from the risk, brought about by the failure of the insured to perform his part of a contract executory upon both sides, would establish a rule in favor of the latter, resisting upon his own default and a violation of his legal

⁴⁰ *Phoenix Ins. Co. v. Lansing*, *supra*; *Schoneman v. Insurance Co.*, 16 Neb. 404, 20 N. W. 284; *Farmers' Mut. Fire Ins. Co. v. Bowen*, 40 Mich. 147.

duty. If he pays the entire premium in advance, or fails to pay it *ad diem*, or at maturity, as he has contracted, the law will not relieve him, when the forfeiture of the policy arises from his own neglect. It is vital to the existence of fire insurance companies, and the interests of both stockholders and policyholders, that the patrons should be prompt in the payment of their premiums, and, upon the other hand, the insurer should be held to a just performance of the contract; but if the insured, without sufficient excuse, has failed to comply with the conditions which constitute the consideration for the undertaking of the company, his complaint, in case of a subsequent loss, cannot be heard. If he neglects to pay his note, without a valid excuse, it is a violation of his plain duty; and, if a subsequent loss occurs, he has no right, upon any legal or equitable principle, to reimbursement."

It is provided by law in Iowa that, not less than 30 days before a premium note falls due, notice must be given of the fact to the insured, and that no forfeiture shall result until 30 days after such notice. In *Harle v. Council Bluffs Ins. Co.*,⁴¹ under the provisions of this statute, a note was sent to the postmaster, who was the insured, but it appears that this fact was unknown to the company. In presence of witnesses, the insured tore his name off from the note, and at the same time placed the money required for its payment in an envelope, intending to mail it, as is alleged, to the company; but this he neglected to do until after more than 30 days from the time the letter inclosing the note was received by him. When sending the money to the company, some 8 or 10 days subsequent to the fire, he omitted to mention that a loss had been sustained under the policy. The money was accepted by the insurer, and retained. The Iowa supreme court held: "It is perfectly clear, we think, that the receipt of the money, and its retention, under the circumstances, could not amount to a waiver, or reinstate the policy in force as a binding contract of insurance. The policy had elapsed, solely through the fault and neglect of French [the insured], before the property had been destroyed. When payment was made the subject-matter of the contract was not in existence. This French knew, but the defendant did not. It received the money under a mistake of facts. Good faith and fair dealing on the part of

⁴¹ 71 Iowa, 401, 32 N. W. 396.

French required that he should have notified the defendant, that the property had been destroyed, and we think his suppression of such facts amounts to a fraud; and, as no one can be permitted to reap a benefit through or by means of a fraud perpetrated by him, therefore the plaintiff cannot recover. But the failure of French to pay the premium had the effect to render the policy void, so far as the right to recover thereon is concerned. The defendant has done nothing to avoid the contract, but has been ready at all times to perform it.”⁴²

The supreme court of Nebraska, in *Phenix Ins. Co. v. Bachelder*,⁴³ held valid the stipulation contained in the policy, that the insurance should be suspended during any default in payment of the premium note. We quote from the opinion by Justice Norval. He said: “The clause referred to is not unreasonable. It is but fair and just that while the insured is in default of the payment of his note the company should not be liable for loss, when the parties have so agreed. We have no right to make a new contract for them, or refuse to enforce the one they have made. To hold that the policy was in force at the time of the fire would be to set aside and disregard the plain stipulation of the parties.”

§ 94. Premiums must be Paid in Money.

In the absence of any special agreement, the insurance premium must be paid in money. Unless objected to, currency, or even checks, drafts, or bill of exchange, will constitute payment; but the agent will not be presumed to have authority to accept merchandise on personal account. The distinction between the agent and his principal should be kept in view. The premium on a policy of insurance is the property of the latter, and not of the former. Where the agent delivers a policy to the merchant with whom he has dealings, and to whom he is indebted for goods due for the use of his family, and the

⁴² In principle this case is like *Harris v. Insurance Co.*, 53 Iowa, 236, 5 N. W. 124. See, also, *Redfield v. Insurance Co.*, 6 Abb. N. C. (N. Y.) 456; *Diver v. Insurance Co.*, 17 Ins. Law J. 156; *McMartin v. Insurance Co.*, 41 Minn. 198, 42 N. W. 934; *Continental Ins. Co. v. Hillmer*, 42 Kan. 275, 287, 21 Pac. 1044; *Robinson v. Insurance Co.*, 76 Mich. 641, 43 N. W. 647; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 6 Dak. 458, 43 N. W. 693.

⁴³ 32 Neb. 490, 49 N. W. 217, and 21 Ins. Law J. 618.

premium, by agreement, is placed to the credit of his account, it is a fraud on the principal; and, should a loss occur, the agent having failed to remit, the insurer will not be liable. The agent cannot appropriate to his own use the funds of his principal, without a wrong being done the latter; and when merchandise is accepted in payment, or the premium is applied to pay a debt due to the insured, the latter becomes a party to the wrong, and the company will not be bound.

In *Hoffman v. John Hancock Mut. Life Ins. Co.*⁴⁴ the facts recited show that the agent had accepted in payment of the premium certain articles of personal property, among which was a horse valued at \$400. Justice Swayne, who delivered the opinion of the court, said: "If the agent had the right to take his percentage in such a way as he might think proper, this did not justify his taking a horse at \$400; for if Thayer [the agent] had expressly agreed to take a horse in payment of the premium, pro tanto, could that have given validity to the transaction? If the agent had authority to take the horse in question, he could have taken other horses from Hoffman, and could have taken them in all cases. This would have carried with it the right to establish a stable, employ hands, and do everything else necessary to take care of horses until they could be sold. The company might thus have found itself carrying on a business alien to its character, and in which it had never thought of embarking. The exercise of such a power of the agent would be liable to objection. It was *ultra vires*, and it was a fraud in respect to the company. Hoffman must have known that neither Goodwin nor Thayer had any authority to enter into such arrangements, and he was a party to the fraud. No valid contract, as to the company, could arise from such transactions. This objection is fatal to appellant's case." The agent in this case may have taken the horse with no purpose of defrauding his company. He may have intended to sell it, and remit the proceeds of the sale to the company, for whom he was assuming to act in a manner and matter without warrant. As the court said, what he had undertaken to do was "*ultra vires*." This fact must have been understood by the insured, from the nature of the transaction. As an intelligent and reasonable man, he could not

⁴⁴ 92 U. S. 161.

suppose that it was within the scope of authority of one acting as agent of an insurance company to buy and sell property of this class. He must have presumed, from the circumstances of the case, that the agent was acting in fraud of his principal; and in this knowledge, actual or presumptive, he becomes a party to the wrong.

Story on Agency ⁴⁵ states the law as follows: "An agent authorized to receive payment has not an unlimited authority to receive it in any way he may choose, but he is ordinarily deemed intrusted with the power to receive it in money only." And in section 181 the same writer further says: "Where an agent has general authority to receive payment of a debt, he is ordinarily bound to receive the whole of it in money only, for that is the only way which will enable him completely to discharge his duty to his principal. But circumstances may vary his duty; as, for example, if he is a creditor of his principal, and the latter has authorized him to take from the sum received the amount due to himself, it will be sufficient for the agent to receive the balance in cash which will remain due to the principal after deducting the sum due to himself, and, as to the other part of the debt, he may settle it with the debtor as he pleases. Applying this principle to the insurance contract, it would be lawful for him to receive his commissions in the settlement of his personal account, or in merchandise, but that portion of the premium which should be paid to the company could not be paid in this manner without violating the laws of agency." The commentator, in his notes on this section, adds: "But the fact that the principal has on two occasions sanctioned the payment to his agent of a pipe, watch, and chain, and charged the same to the agent's account, for a debt which the agent had authority to collect in money, would not authorize the agent to sell any property of his principal, and take in payment a piano."

Cases involving this principle of agency have frequently had the consideration of the courts, and we can in no better way explain the application of the general rule affirmed than by quoting from selected leading cases, where the contention has arisen under circumstances so different that the discussion has embraced, in one form and another, the whole subject in controversy.

⁴⁵ Section 98.

The case of *Aultman & Co. v. Lee* ⁴⁶ is one frequently referred to, and has become a leading authority in regard to the power of an agent to receive payment in any other manner than that in which he has either express or implied authority from his principal to do. The facts, briefly stated, show that one Helguson was the agent of the plaintiffs for the sale of farm machinery, and that he sold to the defendant, Lee, a threshing machine, and took his note in payment. Helguson afterwards purchased from Lee a quantity of wheat, with a distinct understanding that the wheat should be sold, and the proceeds applied in payment of the note. There was a trial by jury, and the court, in its instructions, stated the law as follows: "Before you find for defendant, you must be satisfied that the note has been paid to plaintiffs, or to some person by them duly authorized to receive such payment. If payment is made to the agent, it must be made in money, unless an agreement is shown, or authority is established in the agent, to receive payment otherwise. If Helguson was the agent of the plaintiffs and in possession of the note, defendant was authorized to pay Helguson on the note; and if Lee took the wheat to Helguson, sold the same to him, and Helguson, as agent afore-said for Lee, took the money, the proceeds of the wheat, for the plaintiffs, and was then in possession of the note, and was to indorse the same on the note, then the money proceeds of the wheat, if applied on the note, would be his payment of the note." From the opinion of the supreme court of Iowa, where the case went on appeal, we quote as follows: "The testimony of the defendant is that Helguson did not apply the proceeds of the wheat to the payment of the note. Because of its inapplicability to the testimony, and its tendency to mislead, this instruction should not have been given. The verdict of the jury is contrary to the evidence. The testimony of the defendant does not establish the defense of any payment. The transaction proved was simply this: Defendant sold wheat to Helguson, who was in possession of the note. Helguson agreed to pay a part of the price of the wheat to plaintiffs on the note. Helguson did not do as he agreed. Upon the sale of the wheat, Helguson became debtor of the defendant. If plaintiffs had been present, and had agreed to take Helguson in payment, there would have been a

⁴⁶ 43 Iowa, 404.

novation, and it would have been discharged, but to this end the concurrence of the three parties interested is necessary. It is now plain that, without the knowledge or assent of the plaintiffs, an old debtor has been discharged, and a new one has been substituted. A., as agent to B., has in his hands for collection a note of C.'s for \$100. C. has a horse which he wishes to sell, and B. desires to buy. The horse is turned over to B., who agrees to pay the price, \$100, to A. on C.'s note. Does this discharge the note, or is A. compelled to accept B. as his debtor, instead of C.? Manifestly not. The case supposed is on the same principle as the case at bar."

See, also, *Drain v. Doggett*.⁴⁷ Justice Beck in that case said: "The law is well settled, and has been so held by this court, that the holder of a note for collection, if an agent or attorney, has no right to receive in payment anything except the money, unless specially authorized to do so by his principal or client."⁴⁸

In *Wheeler & Wilson Manuf'g Co. v. Givan*⁴⁹ the plaintiffs employed an agent, who was selling machines, and, in the prosecution of this business, was traveling from place to place. He sold to the defendant a machine, and agreed that he would accept board in his family, and that the cost of board thus had should be credited to the defendant in payment of the machine. The court held that an agent thus employed had no power to barter or exchange the property with which he was intrusted, or to pledge it in any way for his own debt; that an agent must sell, in the absence of any special instructions or authority, in the ordinary manner, and receive pay only in money; that he could not dispose of his principal's goods under conditions that would make himself the debtor.⁵⁰

In the case last referred to (*McCormick v. Keith*⁵¹) the court said: "The general rule applicable to a case like this is that an

⁴⁷ 41 Iowa, 682.

⁴⁸ *Graydon, Swanwick & Co. v. Patterson*, 13 Iowa, 256; *Hall v. Storrs*, 7 Wis. 253; *Higgins v. Moore*, 34 N. Y. 422; *Bridges v. Garrett*, L. R. 5, C. P. 451; *Bertholf v. Quinlan*, 68 Ill. 297.

⁴⁹ 65 Mo. 89.

⁵⁰ The case of *Holton v. Smith*, 7 N. H. 446, is to the same effect. See, also, *Benny v. Rhodes*, 18 Mo. 147; *Stewart v. Woodward*, 50 Vt. 81; *La Point v. Scott*, 36 Vt. 608; *McCormick v. Keith*, 8 Neb. 143.

⁵¹ 8 Neb. 143.

agent, in the absence of authority from his principal, either express or implied, can accept only money in discharge of his debt. Conceding that the authority of a general agent extended to the settlement or compromise of plaintiff's claim, it would by no means follow that it would extinguish a debt due to his principal by setting off against it his own debt."

In *Todd v. Reid* ⁵² the court said: "It was but an attempt to pay the debt of one person with the money of another. This the law will not tolerate."⁵³

The law is stated in *Benjamin on Sales* ⁵⁴ as follows: "That a broker or agent employed to sell has prima facie no authority to receive payment otherwise than in money, according to the usual mode of business, has been well established; and it seems equally clear that if, instead of paying money, the debtor writes off a debt due to him from the agent, such a transaction is not payment, as against the principal, who is no party to the agreement, although it may have been agreed to by the agent."⁵⁵

If, among the very large number of courts in this country that are daily passing upon questions of law, we occasionally find those that are impatient of the restrictions which time-honored rules impose, the fact need cause no alarm concerning the stability of the law, and the permanency of benefits to be enjoyed from our system of jurisprudence. Our courts are often wise, but not always so, and there appears no reason why our confidence in the ways of justice should be disturbed if we sometimes discover tendencies to temporarily diverge from the safe and conservative lines which the doctors of the law have followed for generations. It is doubtless true at this time, when vast business enterprises are managed wholly by agents, that there is a growing tendency on the part of some of the courts to enlarge the powers of the agent, and to magnify him into the alter ego of the principal. Particularly is this true when he is the repre-

⁵² 6 E. C. L. 404.

⁵³ *Greenwood v. Burns*, 50 Mo. 52; *Farrar v. Triplett*, 7 Neb. 237; *Phillips v. Mayer*, 7 Cal. 81.

⁵⁴ Section 1099.

⁵⁵ *Reynolds v. Ferree*, 86 Ill. 570; *Trudo v. Anderson*, 10 Mich. 357; *Burger v. Limbach*, 42 Mich. 162, 3 N. W. 942; *McCulloch v. McKee*, 16 Pa. St. 289; *Drain v. Doggett*, 41 Iowa, 682; *Kendall v. Wade*, 5 La. Ann. 157.

sentative of a corporation. Concerning the business to which he has been appointed, he is often regarded as having the same authority as the principal might exercise when acting in his own behalf. The reserved powers of the principal are dissipated by construction, and especially is his right to limit the powers of the agent in important respects denied. The legal presumptions that have long existed for the protection of the principal are now often withdrawn.

We have seen, in the discussion of the preceding pages, that the courts have inflexibly refused to permit the agent to use the principal's money in his personal business, or to increase his personal comfort. The law has always recognized a distinct line of separation between the affairs of the agency and the personal matters of the agent. The departures to which our attention is called are not numerous, and are notable only because they indicate a tendency to diverge from safe rules.

In *Kerlin v. National Acc. Ass'n*⁵⁶ the premium was \$30, and, the agent owing a debt of \$10 to the insured, the court held that the deduction of such debt from the premium was permissible; recognizing the competency of the parties to arrange for the agent to pay his personal debt with his principal's money.

In *Jones v. Aetna Ins. Co.*⁵⁷ the insured was allowed to pay his premium by entering upon his books a credit in the personal account of agent; and in *Carlwitz v. Germania Fire Ins. Co.* the insured was a merchant, and the agent received the premium due the company in trade from the insured's store.⁵⁸

§ 95. Conclusions.

The premium is the consideration on which rests the promise of indemnity, and unless payment is made, or arranged for at a future time, the insurer will not be charged with loss under the policy.

While payment of premium cannot be excused, as in such case there will be no consideration for the contract, immediate payment may be

⁵⁶ 8 Ind. App. 628, 36 N. E. 156.

⁵⁷ Fed. Cas. No. 7,453, 8 Ins. Law J. 415.

⁵⁸ Fed. Cas. No. 2,415a, 12 Ins. Law J. 127.

waived. The question as to whether there has been a waiver will be for the jury.

Unless there is a promise, express or implied, to pay a premium, an indispensable element is wanting to a completed contract. The parties have not yet agreed to all the essential conditions.

When the policy is delivered, containing words clearly expressing an acknowledgment that the premium has been received, the company will be estopped from refusing to pay a loss on the ground that no actual payment has been made. The usual rule, that a receipt is only *prima facie* of payment, does not apply to defeat rights that proceed from the contract in its operation concerning future contingent events.

When the insurer places its policy in the hands of a broker to deliver to the insured, payment of the premium to such broker will be payment to the insurer. Having the policy for purpose of delivery implies authority to make collection of premium.

Where the note given for a premium is made negotiable, is not referred to in the policy, and its payment at maturity made a condition of the insurer's liability, the insolvency of the insured and the nonpayment of the note will not relieve the company from the payment of a loss.

If the premium note is referred to in the policy, and its payment at a stipulated time is made a condition precedent to the payment of a loss, there must be strict compliance, or the insurer will be discharged.

When the premium note does not designate any place of payment, the maker of the note must seek the payee.

Payment of premium may be made, except when otherwise agreed upon or objected to, by check, draft, currency, or in any other convenient and customary manner. If, however, money is demanded, gold or legal-tender funds will be required.

CHAPTER V.**PARTNERSHIP.**

- § 96. Changes in Partnership.
- 97. What is a Partnership.
- 98. What is a Dormant Partner.
- 99. When a Change in Partnership Voids the Policy.
- 100. The Conditions of the Policy a Part of the Consideration.
- 101. When a Partnership is Dissolved and the Property Divided, the Insurance Terminates.
- 102. When a Partnership may Exist although There is No Contribution to the Capital Stock by Certain of the Partners.
- 103. A Partner may Insure His Undivided Interest.
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§ 96. Changes in Partnership.

The changes that frequently occur in the personal organization of a partnership have occasioned much contention in the courts as to whether such changes are in violation of the condition of an insurance contract which provides that it shall become invalid when there has been an alienation of the property, or when any change has taken place in title or possession. There are three classes of changes which the courts have been most frequently called to consider in reference to the question of whether a forfeiture has occurred on account of this stipulation in the policy: First, when one or more partners retire from the firm, selling their interest to the other partners, who retain ownership and continue in the management of the business; second, when one or more strangers are received into the firm, and exercise an influence in the control of its affairs; third, such changes *inter sese* as may increase or diminish the interest of any individual member of the firm. Changes of the third class have seldom been held by the courts to be of sufficient importance to affect in any substantial manner the rights of

the insurer.¹ It is, however, easy to understand that the shifting of interests between partners may sometimes materially change the character of the risk. Let us suppose a firm composed of Brown and Jones, having a capital of \$10,000, of which Brown contributes \$7,500, and has the chief management of the company's business. The underwriter, when insuring the property, has learned the situation of af-

¹ The policy provided against change of title and interest, on penalty of forfeiture. The firm consisted of three partners when the policy was issued. During the term of the insurance, two of these sold to the third. Held, that there had been such change in title and interest as to invalidate the insurance. *Oldham v. Insurance Co.*, 90 Iowa, 225, 57 N. W. 861; *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77.

In the last case, a new partner was admitted during the period the policy was to continue.

In *Jones v. Insurance Co.* (Iowa) 66 N. W. 169, J. and K. were partners. One sold to the other, taking a note for the purchase price, with an agreement that, if note was not paid at maturity, his interest should continue until payment was made. The policy had the usual provision in regard to forfeiture, if there should be any change in title and possession. The court said that there was a change of possession, withholding its opinion as to whether the transaction had effected change of title.

In the case of *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754, Lewis, J., said: "The object of such a provision is to protect the insurer against the risk of the introduction of a stranger to the contract, perhaps not in any way known to them, or, if known, not deemed worthy of their confidence. But this reason cannot apply where there is simply a transfer of interest by one partner to another. It is suggested that the provision in the policy may have been designed to secure the continuance in the firm of the only member in whom the insurer reposed confidence. But to this we answer, in the language of the New York court of appeals, in the well-considered case of *Hoffman v. Insurance Co.*, 32 N. Y. 405, where, in answer to a similar suggestion, it was said: 'The only evidence of the confidence of the insurers in either of the insured is the fact that the company contracted with all, and the theory is rather fanciful than sound that the former may have intended to conclude a bargain with rogues, on the faith of a proviso that an honest man should be kept in the firm to watch them.'" See, also, *Powers v. Insurance Co.*, 136 Mass. 108; *Burnett v. Insurance Co.*, 46 Ala. 11; *Pierce v. Insurance Co.*, 50 N. H. 297; *West v. Insurance Co.*, 27 Ohio St. 1; *Lockwood v. Assurance Co.*, 47 Conn. 553; *Texas Banking & Ins. Co. v. Cohen*, 47 Tex. 406; *New Orleans Ins. Ass'n v. Holberg*, 64 Miss. 51, 8 South. 175; *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220, 24 N. E. 538; *Dermani v. Insurance Co.*, 26 La. Ann. 69; *Dresser v. Insurance Co.*, 122 N. Y. 642, 25 N. E. 956; *Drennen v. Assurance Corp.*, 20 Fed. 657; *Klein v. Insurance Co.*, 3 Ont. (Can.) 234.

fairs, and is content to accept the risk for the agreed premium, relying upon the intelligent care which the property will receive under Brown's supervision and control. Jones, it may be understood, has indifferent business qualities, and is a person of careless habits, one in whom no confidence can be placed in providing for the security of the property insured. The paramount interest of Brown is the only guaranty which the insuring company has for the protection of its venture, but during the term of the policy Brown sells to Jones two-thirds of his interest in the business, and the latter assumes the management of affairs. The change is one of vital importance to the insurer. Still, it is one that the courts have with much uniformity disregarded. Their decisions seemingly are based on the principle that the insurer has accepted both partners, and that, if distinctions are to be made such as we have here suggested, it is the privilege and the duty of the company to so provide by the use of language that will leave no doubt in respect to its intentions.

§ 97. What is a Partnership.

What constitutes a partnership is not always easily determined, and the question has frequently required the consideration and judgment of the courts. In most cases, of course, the relations of persons associated in business undertakings are readily understood among themselves, and by those with whom they deal in their corporate or partnership character. Ordinarily, their individual rights and responsibilities are fixed by definite and specific agreements. When this occurs, important questions will seldom arise as to the interests and obligations of those who are members of the partnership or corporation. Where there is a contribution of capital and a sharing in profits, partnership may exist. Parsons says that the test of partnership is "community of profits."

§ 98. What is a Dormant Partner.

In Lindley on Partnerships, we find this definition of a "dormant partner." He says: "The right of a lender is to be repaid in money, with such interest or shares of profit as he may have stipulated for, and his right to a share of the profits involves a right to an account

and to see the books of the borrower. If he stipulates for more than this,—that is, for a right to control the business or the employment of the assets, or to wind up the business, or if his advance is risked in the business, or forms a part of the capital in it,—he ceases to be a mere lender, and becomes in effect a ‘dormant partner.’”

The line between the lender and this class of partners may often be so obscure as to cause much difficulty in definitely establishing the rights and responsibilities of those who sustain relations to others, or to a business which, while in a sense casual and accidental, results in both the contribution of capital and the sharing of profits. Cases of this kind are usually presented in connection with some special undertaking. There has not been deliberation and agreement. An exigency has arisen demanding instant action. Some one has supplied capital; some one else, service. Profit or loss has resulted, and the parties concerned subsequently find it necessary to refer to the courts to establish the proper legal effect of what they have severally or collectively done.

In *Berthold v. Goldsmith*,² it was said by the court: “A partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill of some one, or all of them, in lawful commerce or business, with the understanding that there shall be a community of profits thereof between them. * * * Whenever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between parties themselves, and, of course, it is so as to third persons. All of the decided cases, however, agree that it is seldom or never essential that both of these ingredients should occur in a case in order to establish that relation. Cases occur undoubtedly where a community of interest in the property, without any reference to the profits, will almost necessarily lead to the conclusion that the relation of the parties is that of partnership; and under some circumstances that conclusion will follow, although the sale of the property for joint interest may not be contemplated by the parties. * * * Actual participation in the profits as principal, we think, creates the partnership as between the parties and third persons, whatever may

² 24 How. 536.

be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits. Every man who has a share of the profits of a trade or business ought also to bear his share of the loss, for the reason that, in taking a part of the profits, he takes a part of the funds of the trade on which the creditor relies for payment."

§ 99. When a Change in Partnership Voids the Policy.

Whether a change in partnership will render the policy of insurance void is a question which the courts have passed upon many times, and under circumstances so different in their character that general rules are not clearly discernible. When, however, the policy stipulates only against a change of title or ownership, it has generally been held that any change between the partners does not discharge the insurer; but the rule is otherwise when a stranger is received into the firm.

In the case of *Hoffman v. Aetna Fire Ins. Co.*³ the policy provided that it should be void if the property was sold or conveyed without notice and consent, and, a retiring partner having sold his interest to his co-partner, it was held that such sale did not cause an avoidance.

The same court, it may be mentioned, had previously rendered a contrary opinion, under a contract differing, however, somewhat in its provisions. The exact language of the charter of the company in this case (which was a part of the contract, and referred to, to determine the rights of the parties) read as follows: "When any house or dwelling insured under the provisions of this act shall be alienated by sale or otherwise, the policy shall thereupon be ipso facto void." The words here used to express the condition clearly imply that it was something more than an interest or part that was contemplated by the prohibition. The alienation that was to create a forfeiture referred manifestly to the sale of the entire property. This "condition" is exceptional, and seldom found in policies at the present time. The court, in deciding this case, said: "The alienation here contemplated is a sale by the insured to a party not insured. Any transfer of interest between the parties insured by the policy is not an alienation, within the meaning of the charter. By such a transfer, no new party with

whom the defendant did not contract is introduced, but simply the interest of those who did contract is changed. Such change does not affect the risk, whether partial or extending to the entire interest, so long as no new party is brought into contract relations with the insurer."

The opinion here expressed is undoubtedly in accord with the general trend of authorities. The court further said: "The insurers justified their confidence in each of the assured by issuing to them a policy, but they did not choose to repose blind confidence in others who might succeed them."

A legal writer, commenting on the passage last quoted, ventures the following words of qualified criticism: "The court might have here added with better reason and better logic that 'the insurers reposed confidence in the partners when considered together,—in the firm as then constituted,—but that in no manner justified their confidence in either of them individually.'"

Undoubtedly, it will sometimes occur, and for reasons heretofore pointed out, that an insurance company will be justified in issuing its policy for the protection of two or more persons when owning property together and uniting in its management, when it will properly hesitate to enter into any contract relations with either of the persons separately. "The design of the provision was not," the court further explains, "to interdict all sale, but only sales of proprietary interest by parties insured to parties not insured. It was to protect the company from a continuing obligation if the title and beneficial interest should pass to those whom they might not be equally willing to trust."

In the case of *Burnett v. Eufaula Home Ins. Co.*,⁴ the policy provided that it should become void if, without consent of the insurer, the property covered be sold or conveyed, or the interest of the parties therein changed. One of the partners sold his interest to his associate partner, and, the insurer not having been notified, after a loss it claimed that a forfeiture had resulted. The court held that the company was not relieved. Mr. Wood criticises this decision as follows: "The case carries the doctrine further than was warranted by the cases to which it referred as authority, and further than the rules of fair construction would permit. The interest of the parties in the

⁴ 46 Ala. 11.

property was clearly changed when a part partner became sole owner, or when one joint owner parted with any part of his joint interest in the property." After pointing out the clear distinction between the case under consideration and the one in New York to which the court referred in support of the position it had taken, Wood again says: "There would seem to be no room for doubt that the object and purpose of the insurer was to keep the interest in the property entirely unchanged, both as to persons and quality." ⁵

The criticism of Mr. Wood appears to be fully justified, in view of the very distinct condition of the policy that it should become void if any change of the interests of the parties in the property should be made. Whether the reasons given for the condition were valid or not, it was clearly the agreement between the insured and the insurer. It was undoubtedly, too, an agreement which the parties had a right to make, and one which it was the clear duty of the court to enforce. In the New York case before referred to (*Hoffman v. Aetna Fire Ins. Co.*), the "condition" was expressed in words of doubtful meaning; and under the familiar rules of construction that, when the language of the contract is uncertain, it shall be construed more strictly against the insurer than the insured, the New York court was possibly warranted in holding that the language used was only intended to prohibit a sale by the persons insured to persons not insured. The assignment of reasons for a stipulation in a contract is always impertinent, unless it be for the purpose of showing the intention of the parties. When such intentions are distinctly expressed, the court has no other duty to perform than to give them legal effect, providing, of course, they are not repugnant to law.

In *Pierce v. Nashua Fire Ins. Co.*,⁶ it was stated that "the chief reason for requiring such a stipulation is to guard against the introduction of a stranger."⁷

This same question has been carefully considered by the Illinois court in the case of *Dix v. Mercantile Ins. Co.*⁸ We quote from the opinion: "The intention of the company was manifestly, as urged, that no stranger should come into the management and care of this property without their consent." But the court adds: "It is

⁵ 1 Wood, Ins. pp. 739, 742.

⁷ *West v. Insurance Co.*, 27 Ohio St. 11.

⁶ 50 N. H. 299.

⁸ 22 Ill. 277.

not plain but that the insurer may be as greatly prejudiced by removing one to whom, with others, they had intrusted the guardianship of valuable property, as by the introduction of a stranger." And it was held that a sale by one partner voided the policy.⁹

In *Shuggart v. Lycoming Fire Ins. Co.*,¹⁰ the policy was written to P. and E., partners, and contained a provision, in substance, that it should be void if the property insured was conveyed or the policy assigned without the consent of the company expressed by written indorsement. Further, the policy contained a stipulation that no agent of the company had power to waive any of its conditions, either before or after a loss, without special authority in writing from the company to do so. After the insurance was effected, and without the consent of the defendant company, E. sold his interest in the insured property to P. The local agent was notified of this sale, and promised to procure the required indorsement on the policy, but failed to do so. It was held that the policy was rendered invalid by the sale to the extent of the interest transferred; that the oral promise of the agent to obtain the consent of the company to the assignment in the required form did not have the effect to create a waiver of the condition in regard to written indorsement; and that receiving the premium after the sale, notwithstanding the knowledge of the agent, did not estop the company from insisting on a forfeiture.

In *Wood v. Rutland & A. M. F. Ins. Co.*,¹¹ it was said by the court that, "when one partner sells to his associates, there can be no recovery by the old firm for a subsequent loss. Where there is a vol-

⁹ The conclusion here reached by the Illinois court is fully supported by *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179; *Finley v. Insurance Co.*, 30 Pa. St. 311; *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279; *Dey v. Insurance Co.*, 23 Barb. (N. Y.) 623. In *Wood v. Insurance Co.*, 31 Vt. 552, 563, the court declared the law to be: "When one partner sells to his associates, there can be no recovery by the old firm for a subsequent loss. * * * The insurance company may well say that the new firm is not the party with whom it contracted." *Keeler v. Insurance Co.*, 16 Wis. 523; *Home Mut. Fire Ins. Co. v. Hauslein*, 60 Ill. 521; *Lappin v. Insurance Co.*, 58 Barb. (N. Y.) 325; *Savage v. Insurance Co.*, 52 N. Y. 502; *Biggs v. Insurance Co.*, 88 N. C. 141; *Oakes v. Insurance Co.*, 131 Mass. 164.

¹⁰ 55 Cal. 408; *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848.

¹¹ 31 Vt. 552.

untary change of the firm, the insurance company may well say that the new firm is not the party with whom they contracted."

See, also, *Card v. Phoenix Ins. Co.*¹² The insurance was to S. and N., who were partners. Subsequently, another person, K., became a member of the firm. Later, S. sold his entire interest to N. and K., who gave a chattel mortgage on the property to secure the purchase money. It was a condition of the policy that "if the property be sold or transferred, or any change take place in title or possession, the policy shall be void." Held, that there was such a change in title and possession as to avoid the policy, and that the change was in no important sense qualified on account of the mortgage taken by S. The case was thus stated by the court: "The title and possession at the date of the insurance was in S. and N., and at the date of the loss both title and possession were in N. and K., and that by the voluntary act of the assured." It was the judgment of the court that the policy had been rendered void.¹³

§ 100. The Conditions of the Policy a Part of the Consideration.

By the terms of the insurance contract, it will be found in most cases that the insurer accepts, as a part of the consideration for the indemnity offered, the promise of the insured that he will do, or refrain from doing, certain things that are particularly designated. When the insured fails to perform in these particulars, there is a failure of the consideration. If the parties so elect, they may agree in this manner, and it will be the duty of the court to enforce the agreement. The insurance company may exact a large premium, and make its promise to indemnify without qualification or condition, and in reference to other matters; or it may act upon the more conservative principle of business, and accept a smaller premium, in consideration that the risk, in all its circumstances and the interest of the insured therein, shall continue unchanged during the term of the insurance. When this is done in a form of words that distinctly indicates the intention of the parties, any failure to perform the condition releases the insurer as effectually as though there had

¹² 4 Mo. App. 424.

¹³ See authorities cited in notes 1 and 9, ante.

been default in payment of the premium. It is not a prerogative of the court to distinguish which conditions are arbitrary and unreasonable, and which are founded upon considerations affecting the substantial rights and interests of the parties. The materiality of these stipulations has been established by the agreement of the parties themselves, and the reasons which may have existed to induce them to enter into a contract in the form presented are not proper subjects of inquiry or discussion.

In *Dey v. Poughkeepsie Mut. Ins. Co.*,¹⁴ the court pertinently said: "The object of the company undoubtedly was to protect themselves against controversies with strangers or persons other than those with whom they contracted. This they had a right to do, and the court cannot make a distinction between different degrees of violation of the provisions of the policy, or measure their extent."

In *Drennen v. London Assur. Corp.*,¹⁵ the question presented for the decision of the United States circuit court was whether the introduction of a new partner, one Arndt, resulted in such a change of interest under the terms of the policy as to cause a forfeiture. Judge Miller said: "There are two things with regard to which insurers are cautious, tenacious, and anxious. One of these is the character of the men with whom they contract, and the other is the character of the man who has possession of the property, especially if it is movable property that is insured; and it is easy to see why this is so. They may very well know that the man or men with whom they deal when the contract is made are cautious, prudent business men, honest, and for a long time successful in business. With these men they contract without hesitation. They have a right to know who these men are, with whom they contract with regard to the possession of the property. They make a contract with A. because they know him, or because they have heard of his character, because they understand that he is honest and fair, and they deal with him just as you would deal with one whom you know to be reliable. You will seek to deal with honest men only. Now, it is against all the principles of contracts to say that, in dealing with one man or with two men, those two can afterwards, acting without the consent of the other party, introduce another man into

¹⁴ 23 Barb. (N. Y.) 623.

¹⁵ 20 Fed. 657, 13 Ins. Law J. 706.

the contract, who has all the rights and all the control which those two had before, because that man may be known to be a scoundrel by the insurance company; and, if that rule prevails, the other parties have a right to introduce the veriest scum of the earth, and men who have half a dozen times been engaged in the destruction of property to get the insurance."

§ 101. When a Partnership is Dissolved and the Property Divided, the Insurance Terminates.

In *Dreher v. Aetna Ins. Co.*,¹⁶ we find a very concise statement of the rule of law applicable in cases of this kind. The property insured was owned by two partners, and, after procuring the insurance, the firm was dissolved, and the property divided. The policy had the usual condition that it should become void if there should be any transfer or change of title in the property insured without consent of the company. We quote from the opinion of the court: "If one of two partners of a mill jointly insured sells his part to a stranger, it may appear like a hardship that such sale should destroy the policy, but it is no more than happens in all cases in which there are joint promisees, covenantees, or obligees, where one discharges the promise, covenant, or bond. The court below should have given to the jury an instruction leaving to them to find the fact of the transfer or change of ownership of the property from the evidence. This transfer did not necessarily require a sale from one to the other of plaintiffs. It is on this ground alone that the case is reversed. The court should have instructed the jury that upon the dissolution of the partnership and a division of the goods, so that the parties are to hold their shares separately and distinctly, it is not strictly a sale of the goods, yet it operates a change of title in the goods; and, for not giving such instructions, this court reverses the judgment of the court below."

In the voluntary dissolution of a partnership and a division of the property, the interests of the parties are changed, and the rights and obligations of the insured under the terms of the policy are affected in the same manner and to the same extent as when property insured, during the continuance of the policy, is partitioned by order of the

court. The interest in common is changed to an interest in severalty. Before the dissolution of the firm or the partition of the estate, each of the partners or the persons to whom the estate jointly belongs has an interest in the whole property. Afterwards the relations are so altered that each individual ceases to have any interest in one part, and becomes the sole owner of another part. This is a different condition of title in very important respects from that existing at the time the risk was accepted by the insurer; and, whether its interests have been prejudiced or not, the change is one it has stipulated against, and, having been made, the insurer is relieved from liability. This proposition is supported by numerous authorities.¹⁷ When the policy is to protect a joint interest, which during the term of the policy is divided, the insurance will not survive to protect either party.

In *Hathaway v. State Ins. Co.*,¹⁸ the facts show that the plaintiff and one E. P. Smith were partners, and, as such, procured an insurance. Subsequently, and before loss, the partnership ceased to exist on account of the purchase by the plaintiff of Smith's interest in the property covered by the policy. It was held that the insurance was terminated by the sale. The court said: "The case turns upon the question whether a change of title of the property resulted upon the dissolution of the partnership, and the sale by Smith to the plaintiff of all his interest in the property, and it seems to us there can be but one answer to this question. During the existence of the partnership, it cannot be said that plaintiff had title to any specific share or interest in the property; but, upon the dissolution of the partnership and the purchase by him of Smith's interest, he was vested with the absolute title to the whole property."

A different rule has been held in Tennessee, where one partner sold to the other; and, a fire having occurred, it was held that the partner who continued the business could recover only for his original interest in the property.¹⁹

The rule, to which considerable attention has been given, that re-

¹⁷ See chapter on "Title and Ownership," § 84, and authorities there cited. *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848.

¹⁸ *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179; *Wood v. Insurance Co.*, 31 Vt. 552; *Hathaway v. Insurance Co.*, 20 N. W. 164, 64 Iowa, 229; *Buckley v. Garrett*, 47 Pa. St. 204; *Dey v. Insurance Co.*, 23 Barb. (N. Y.) 623.

¹⁹ *Hobbs v. Insurance Co.*, 1 Sneed (Tenn.) 444.

ceiving into the partnership a person unknown to the insurer will invalidate the policy, must be understood as having possible exceptions. The courts, in construing a contract, will presume that the parties, in agreeing to its terms, were governed by intelligent and just considerations respecting the mutual benefits to be secured. They will proceed on the idea that forfeitures were not contemplated, except for sufficient reasons. It would be in the line of a prudent conservatism for the insurer to object to the introduction of a stranger into the active management of the business. But suppose the partnership, so far as the new member was concerned, extended only to sharing in the profits of the business carried on; would not then the enforcement of a rule so arbitrary, so destitute of reason and business faith, cause "moralities to shriek aloud"? ²⁰

We must, of course, keep always in mind the personal character of the insurance contract. The company is dealing with persons, concerning things. When A. and B. are insured, and they afterwards take C. into their business, the insurer may well say that "we have no agreement with this new associate. We did not deem it necessary, when insuring you, to consider his personal and business character. Of his integrity and prudence we know nothing, and must decline to recognize him as a party to our agreements." ²¹

A surviving partner, who is also administrator of deceased partner, is not sole owner. ²²

§ 102. When a Partnership may Exist, although There is no Contribution to Capital by Certain of the Partners.

We have heretofore pointed out, in the chapter on "Title and Ownership," that such a partnership may exist as will change the interests of the insured within the terms of the policy, when a person is admitted to the joint control and management of the business of a

²⁰ *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 37 N. E. 460; *Boutelle v. Insurance Co.*, 51 Vt. 4; *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 South. 297; *Welch v. Insurance Co.*, 23 W. Va. 288.

²¹ *Card v. Insurance Co.*, 4 Mo. App. 424; *Malley v. Insurance Co.*, 51 Conn. 222, 13 Ins. Law J. 38; *Blackwell v. Insurance Co.*, 48 Ohio St. 533, 29 N. E. 278; *Germania Fire Ins. Co. v. Home Ins. Co.* (Super. N. Y.) 24 N. Y. Supp. 357.

²² *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473.

firm, and shares in its profits, although he contributes nothing to the capital stock.

This was illustrated in the case of *Malley v. Atlantic Fire & Marine Ins. Co.*²³ The plaintiff became insured in the defendant company, and subsequently received into partnership one Neely, who was to contribute only time and skill. The court held that this change, by creating a partnership where none existed at the time the policy was issued, invalidated the insurance. It said: "When, therefore, the plaintiff, after the delivery of the policy, executed the recited agreement, and by it formed a partnership between himself and Neely for the prosecution of the dry-goods business, and transferred the merchandise insured as his own property to the partnership as his contribution to its capital, he invested Neely with a partner's title to it, which was as absolute in character as his own, though less in value. He did precisely that which he had agreed should make void the contract of insurance."²⁴

§ 103. A Partner may Insure His Undivided Interest.

A partner may protect by insurance his undivided interest in the property owned by the firm. This may be done under a policy issued to the firm, with a stipulation that the loss, if any, shall be paid to the partner for whose benefit the insurance is obtained, or the policy may be written in his own name, and made so as to particularly designate the interest insured. Unquestionably, a suit could be maintained to recover after a loss in either case.²⁵

§ 104. Distinction between a Partner and Stockholder.

The relations of a partner to the business and property of a firm of which he is a member are essentially different from those of a stockholder to the business and property of a corporation in which he owns shares. It has been disputed that a stockholder has an

²³ 51 Conn. 222, 13 Ins. Law J. 38.

²⁴ *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. St. 45.

²⁵ *Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 202; *Tebbetts v. Dearborn*, 74 Me. 392.

insurable interest in the property of the corporation.²⁶ The reasons are not, however, readily understood why the owner of shares in a corporation should not protect himself against loss which he may sustain by the destruction of the corporation property. It is true that the shares are choses in action. At the same time, they have a representative character: they express the definite interest of the owner in the tangible and substantial effects of a company. If the whole capital stock be \$10,000, a person holding shares for \$1,000 will have an interest to the extent of one-tenth in any property of the company subject to loss by fire. The loss to the individual stockholder, whether partial or total, would be as easily ascertainable as it would be in any other case. While it is true that the stockholder does not technically own the property, it will not be disputed that he suffers loss by its destruction in a sum that may be definitely computed. The mortgagee does not own the property covered by his mortgage. He cannot sell or even control it. His interests in law and in fact are less proprietary than those of a shareholder, but the right of a mortgagee to insure is not now questioned.

§ 105. A Stockholder in a Corporation has an Insurable Interest.

In deciding the case of *Warren v. Davenport Fire Ins. Co.*,²⁷ Judge Miller has presented a carefully prepared and interesting discussion concerning the right of a share owner to insure. We quote: "The question raised by the demurrer is whether the parties effecting the insurance in this case had an insurable interest in the property insured at the time the risk was taken, and at the time of the loss by fire. The term 'interest,' as used in application to the right to insure, does not necessarily imply property;²⁸ and, as the contract of insurance is one of indemnity against losses and disadvantages, an insurable interest may be proved in the assured, without the evidence of any legal or equitable title in the property."²⁹

²⁶ *Philips v. Insurance Co.*, 20 Ohio, 174.

²⁷ 31 Iowa, 464.

²⁸ *Hancox v. Insurance Co.*, 3 Sumn. 132, Fed. Cas. No. 6,013; Ang. Ins. § 56.

²⁹ *Putnam v. Insurance Co.*, 5 Metc. (Mass.) 386; *Lazarus v. Insurance Co.*, 19 Pick. (Mass.) 81, 98.

An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Yet such connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of the injury to it.³⁰ In the case under consideration, the assured were stockholders in the Dubuque Lumber Company, a corporation for pecuniary profit. The property destroyed belonged to the corporation. The insurance was upon the interest which the assured had in that property by virtue of the capital stock therein owned by them. The object of the insurance was to indemnify the assured against loss to them in the event of a destruction of the property by fire. Could or would they sustain loss in such event? How would their interest be affected? It seems to us beyond controversy that, in case of the destruction of the corporate property by fire, the stockholders sustain a loss to a greater or less extent dependent on the particular circumstances. Suppose the case of a grain elevator upon some one of our numerous railroad lines, built, owned, and managed by a joint-stock corporation; that this is the only property of the corporation; that the entire capital stock is represented in and by this property; that, in consequence of the profitable nature of the business, large dividends are realized by the stockholders, and the stock is above par in the market. The destruction of the property by fire would at once result in the loss of dividends to the stockholders, and a destruction of the value of the stock, or at least to its reduction to a nominal value. The entire property, representing the whole capital of the corporation, being destroyed, it is difficult to perceive what would give any value to the stock. It is true that, primarily, the loss is that of the corporation, and hence it may insure; but the corporation may refuse to insure, and then the real and actual loss falls on the stockholders.

"The defendant argues that shares of stock in a corporation are choses in action, and are not considered to be an interest in the real property of the company, and cites numerous authorities to sustain this position. This may be admitted without denying the share-

³⁰ *Buck v. Insurance Co.*, 1 Pet. 163.

holders' insurable interest in the property of the corporation. A mortgage, also, is but a chose in action. The mortgagee acquires no right to the mortgaged property which can be attached, levied on under a general execution, or that can be inherited. It is a mere security for a debt.³¹ And yet the cases are uniform to the effect that a mortgagee of real property has an insurable interest therein, which he may insure on his own account, but that, when he does so, it is but an insurance of his debt. And, in case of damage by fire to the premises before payment of the mortgages, his loss, if any, is that his security has been impaired or lost. His interest is but a chose in action in the nature of a security, which he may insure; so that, in case of destruction of or damage to the property upon which his security rests, he will be indemnified for the loss he actually sustains. So, also, it seems to us that the owner of stock in a corporation for pecuniary profit has a like interest in the corporate property. A mortgagee of real property has an insurable interest in the mortgaged premises, based upon the interest he has in the preservation of the same as security for a debt. He has a legal right to contract for indemnity against injury to the value of his security. Upon precisely the same principle, a stockholder may contract for indemnity to the value of his stock, for he also has an interest in the preservation of the corporate property from destruction by fire; and, in its destruction, he sustains loss in so far as the value of his stock is depreciated in consequence thereof, or his dividends cut off. The argument that, if this is allowed, owners of stock worth not more than 10 per cent. upon its nominal value may be insured at its par value, and, in case of loss by fire, such par value of the stock recovered from the insurer, seems to us unsound. Without entering into a discussion in detail of what would be the exact measure of recovery in such case, we simply answer that no more than the actual loss sustained is in any case recoverable. This rule is well established, and rests upon just principles.³²

"The question under consideration has not received direct judicial

³¹ *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Smith v. Bank*, 24 Me. 185; *Abbott v. Insurance Co.*, 30 Me. 414; *Middleton Sav. Bank v. City of Dubuque*, 15 Iowa, 394; *Newman v. De Lorimer*, 19 Iowa, 244; *Baldwin v. Thompson*, 15 Iowa, 504; *Burton v. Hintrager*, 18 Iowa, 348; *Hil. Mortg.* 215,

³² *Ang. Ins. c. 2*, and cases cited in note.

determination in any of the states, so far as we have been able to discover. *Philips v. Knox Co. Ins. Co.*³³ is cited and claimed as an authority against the right of a stockholder to insure. The decision in that case, as a careful examination of the same fully shows, was made entirely upon a construction of the charter of the insurance company, which gave a lien on the insured property, including the land on which the buildings stood. By the charter, a sale of the insured property rendered the policy void; and the ninth section declared that if the insured have a less estate than an unincumbered title in fee simple to the buildings insured, and the lands covered by the same, the policy shall be void, unless the true title of the insured and the incumbrances be expressed in the policy and in the application therefor. The plaintiff insured as owner of the property, which, in fact, belonged to a corporation of which he was a stockholder; and the court held that, 'where a building and the land on which it stands is the property of an incorporated company, the stockholders could not, under the provisions of the defendant's charter, insure such property as their individual property in the defendant's company.' Under the charter of that company, a mortgagee even, insuring the property as his own, would likewise be defeated in a recovery. So the owner in fee simple could not recover if the property was incumbered, and the incumbrance not set forth in the policy; and, of course, the same result must follow where a stockholder insures corporate property as his own individual property. The decision in that case goes no further than this, and is no authority in support of the proposition that a stockholder has no insurable interest in the property of the company, and hence has no bearing upon the question before us."

In *Riggs v. Commercial Mut. Ins. Co.*,³⁴ the New York court of appeals reached the conclusion that a stockholder has an insurable interest in corporate property. The right of the plaintiff to recover on a policy insuring such interest in this case was contested with much obstinacy by able counsel, and it may therefore be fairly presumed that the decision of the court was reached after carefully considering every valid reason presented by the argument of counsel for the parties interested. The fact, therefore, that a stockholder

³³ 20 Ohio, 174.

³⁴ 125 N. Y. 7, 25 N. E. 1058.

has an insurable interest in corporate property, may be regarded as no longer a doubtful question. Andrews, J., said: "The stockholder in a corporation has no legal title to the corporate assets or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner, and can deal with corporate property as owner, subject only to the restrictions of the charter.³⁵ But stockholders in a corporation have equitable rights of a pecuniary nature, growing out of their situation as stockholders, which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits through the exercise of the corporate franchises, and gains so made are distributed among the stockholders according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become a stockholder. So, also, on the winding up of the corporation, the assets, after payment of debts, are divisible among the stockholders. It is very plain that both these rights of stockholders, viz. the right to dividends and the right to share in the final distribution of the corporate property, may be prejudiced by its destruction. In this case the ships were the means by which profits were to be earned, and their loss would naturally, in the ordinary course of things, diminish the capacity of the corporation to pay dividends, and consequently impair the value of the stock. The same would be true in other cases which might be mentioned; as, for example, where buildings producing rent, owned by corporations, should be burned. It is not necessary, to constitute an insurable interest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequence.³⁶ The question now before us was considered by the supreme court of Iowa in the case of *Warren v. Davenport Fire Ins. Co.*³⁷ The court, in a careful opinion, reached the conclusion that a stockholder in a corporation had an insurable interest in the corporate property. In *Philips v. Knox Co. Mut. Ins. Co.*,³⁸ there is an adverse dictum, but the decision

³⁵ *Plimpton v. Bigelow*, 93 N. Y. 593; *Van Allen v. Assessors*, 3 Wall. 573.

³⁶ *Cone v. Insurance Co.*, 60 N. Y. 619.

³⁷ 31 Iowa, 464.

³⁸ 20 Ohio, 174.

went on another ground. In *Wilson v. Jones*,³⁹ the action was upon a policy in favor of the plaintiff, a shareholder in the Atlantic Telegraph Company, a company organized to lay the Atlantic cable. The court construed the contract as an insurance of the plaintiff in respect to the adventure undertaken by the company to lay the cable, and it was held that his interest as shareholder was an insurable interest, and likened it to the insurance on profits. See, also, *Pater-son v. Harris*.⁴⁰ It is difficult to perceive any good reason why, if a stockholder could be insured on his shares in a corporation against a loss happening in the prosecution of a corporate enterprise, he could not insure specifically the corporate property itself embraced in the adventure, and prove his interest by showing that he was a shareholder. The question here is, did the plaintiff have an insurable interest covered by the policy? * * * We are of opinion that the view that a stockholder in a corporation may insure specific corporate property by reason of his situation as stockholder stands upon the better reason, and also that it is in consonance with the current of authority defining insurable interests in our courts. * * * In conclusion, it seems to us, both upon authority and reason, that the insurance now in question is not a wager policy, but is a fair and reasonable contract of indemnity, founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured."

§ 106. Firm Names.

Persons conducting any business enterprise may assume a firm name, and one, too, which fails to indicate in any manner the identity of the persons interested, except in states where it is forbidden by statute to do so. Thus, Brown and Benson, associated as partners, may carry on their business under the firm name of "Johnson & Co.," or they may choose a name appropriately designating the department of trade or manufacturing in which they are particularly engaged, as "The Chicago Iron Company."

It was said in *Edgerton v. Preston*⁴¹ that "the style of a partnership is wholly conventional, and, in the absence of a restrictive statute, a firm may adopt any name it sees fit. Where a note is made

³⁹ L. R. 2 Exch. 139.

⁴⁰ 1 Best & S. 336.

⁴¹ 15 Ill. App. 23.

payable to order, and the name used is employed as the style or designation of an actual person, firm, or company, the payee is not fictitious."

§ 107. Corporate Names.

In certain states, notably in New York and Illinois, it has been attempted to regulate these matters by statutes, and to prohibit the use of fictitious names under which might be concealed the identity of the persons actually engaged in the business which the title or firm name was used to designate. In the Criminal Code of Illinois,* we find it thus provided: "If any company, association or person puts forth any sign or advertisement, and there assumes, for the purpose of soliciting business, a corporate name, not being incorporated, or being incorporated puts forth any sign or advertisement, assuming any other or different name from that by which it is incorporated or authorized by law to act, such company, association or person shall be fined not less than \$10, nor more than \$200, and a like sum for every day he or it shall continue to offend after having been once fined."

In defiance of this statute, Edgerton and Sloan, associated as co-partners, found it for their advantage to conduct the business in which they were engaged under the name of the "Garden City Veneer Mills." As they were not incorporated, and apparently doing business in violation of law, Preston, Kean & Co. disputed their right to recover on a check of which the "Garden City Veneer Mills" was payee. The court of appeals held: "The mere assumption of a name appropriate for a corporation would be no violation of the statute," etc.; and then, as if for the purpose of further explaining the intention of the statute, added: "Nor do we think that, even if it should be found that there had been a violation, the consequences of such violation could be extended beyond the infliction of the penalty therein prescribed. The statute does not provide that contracts made by persons thus offending shall be invalid. * * * It is familiar law that the name or style of a partnership is wholly conventional, and that, in the absence of a restrictive statute, a firm may adopt any name it sees fit."⁴²

* Chapter 38, § 220.

⁴² 15 Ill. App. 23.

In the state of New York, a law was enacted in 1833 intended to prevent fraud by suppressing the use of fictitious "firm" or "corporate" names. Among the other things forbidden by the statute was the annex "& Co.," unless an actual person was represented; but it appears that the rigor of the statute has been softened by construction, as it has been held that the inhibition does not apply to or include the use of the real name of an actual partner, although such partner is under disability at the time. Thus, where a firm was composed of a husband and wife, the latter being only designated by the "& Co.," and it not appearing that there was any purpose to impose upon the public, or to unfairly advertise the credit of the firm by this means, it was held not to be in violation of the statute, notwithstanding the disability of a wife to become the partner of her husband.⁴³

The New York statute forbids the transaction of any business in the name of a partner not interested in the firm, and hence the name of a deceased partner, if continued in the firm name, would be a violation of the statute, and an action to recover for goods sold failed, although no wrongful intent appeared.⁴⁴

But, in the absence of any statutory provision, persons engaged in any lawful business enterprise may take such firm names as will be found convenient or best intended to express the purpose of the joint undertaking. Partnerships may assume any name that will best accommodate their circumstances, or designate the special character of the business in which they are engaged.

Lindley on Partnership says: "In this country a person may legally do business under a name not his own. * * * A partnership is not illegal because it carries on a business under a name which does not disclose its members."

While a contract of insurance is a personal one, that fact will not prevent a corporation or a partnership from insuring. The personality in both cases is concealed behind the name, which expresses only that which is impersonal; and, where the insurer desires to be informed who the persons are that compose the partnership or own the shares of the corporation, it will be its duty to make such par-

⁴³ Zimmerman v. Erhard, 83 N. Y. 74.

⁴⁴ Lane v. Arnold, 13 Abb. N. C. (N. Y.) 73.

ticular inquiry as will disclose the facts wanted, and, failing to do so, it cannot, after a loss, escape payment on the ground that the names of the particular persons interested had not been represented in compliance with the provisions of the policy. Firm names and corporate names, without incorporation, may be assumed; and, under such names, chattels may be bought and sold, and the persons associated under such common accepted name, or so designated, may sue and be sued, and do whatever may be necessary to be done in the ordinary or extraordinary course of business affairs.

In *Phoenix Ins. Co. v. Hamilton*,⁴⁵ the statement of facts shows that Vincent Hamilton and Joshua D. Cook had been partners in the grain and commission business at Toledo, Ohio. Hamilton retired from the business, and of this dissolution of the partnership no notice was given. By the consent of the retiring partner, Cook continued in business under the original firm name. Subsequent to the withdrawal of H., the policy on which this suit was brought to recover was procured in the name of Hamilton & Cook. One of the defenses set up was a want of insurable interest in Hamilton, and thus the question was presented whether an insurance would be valid when effected in the name of a nominal partnership, the business being carried on by and for the benefit of one of the partners only. Bradley, J., delivered the opinion of the court, from which we quote so much as relates to this discussion: "Hamilton was a nominal partner, held out to the world as a member of the firm by his own consent, and affected with every liability of a partner to consignors, creditors, and all persons dealing with the concern. The plaintiffs claim that this was a sufficient interest to support the policy, at least in the commission business, where insurance was effected for the benefit of the real owners of the goods. It is objected that a nominal partner is only held such, adversely, for the purpose of subjecting him to liability as a partner, and not for the purpose of giving him the benefit and advantages of a partner. But, while this is generally true, the interest of a nominal partner in the liabilities of a firm is such as should entitle him, in the absence of any attempt to defraud, to join with the other members of the firm in effecting insurance on the property of the concern. As Chief Jus-

⁴⁵ 14 Wall. 504, 2 Ins. Law J. 131.

tice Jones remarked, in *De Forest v. Fulton Ins. Co.*:⁴⁶ 'It does not always require either the legal title or beneficial interest in the property to entitle a party otherwise connected with it to effect a valid insurance upon it. A carrier may insure goods on contracts to convey, yet he has neither the legal title nor beneficial interest in them, but he is responsible for the loss.' But the case of a nominal partnership carried on for the benefit of one or more members of the firm seems to be still stronger, for it may be said that the legal interest in the business is in the firm, while the beneficial interest is in the member or members for whose use it is carried on. In the case before us, as to all the world except themselves, the legal interest of the business was in the firm of Hamilton & Cook, the beneficial interest in Cook alone; and, as it is well settled that a trustee or agent may insure the property held in that capacity for the benefit of all concerned, there seems to be no valid reason why persons constituting a nominal partnership should not become competent to effect insurance as well as transact the other business in the partnership name. In this case, the intimate connection of Hamilton with the business, and the fact that, as between him and the consignors of the grain insured, the railroad company with whom it was stored, and all other persons dealing with it, he was actually a partner, and incurred all the responsibility and risk attached to that relation, constituted, in our judgment, a sufficient basis of interest for effecting insurance in the name of the firm. The doctrine established by a number of cases, that nominal partners are proper plaintiffs as well as proper defendants in actions by and against the firm, lends support to this view.⁴⁷ * * * We may refer to the cases in New York, which decide that a sale by a retiring partner to his co-partners of his interest in the firm is not a breach of the condition that the policy shall be void if the property is conveyed without the consent of the insurance company."⁴⁸

⁴⁶ 1 Hall (N. Y.) 110.

⁴⁷ 1 T. Pars. Partn. 134; Story, Partn. §§ 241, 242; *Dumpor's Case*, 1 Smith, Lead. Cas. 119.

⁴⁸ *Hoffman v. Insurance Co.*, 32 N. Y. 405.

§ 108. Conclusions.

Partnership is the association of two or more persons for business purposes, agreeing to unite their capital, labor, and skill, and to share in fixed proportion the profits or losses of their joint undertakings.

A dormant partner is a person who, while contributing to the capital of a firm, is silent as to the management and control of its business; one who is frequently guarantied against loss, and agrees to accept a share of the profits realized in lieu of interest on the capital he has invested.

The courts are not in accord as to whether changes between partners—that is, by one partner selling to another—will cause an avoidance of a policy which provides against “any change of title or possession.”

When any change takes place by which a stranger is admitted to the firm, the insurer will be discharged. A change of interest has occurred which the contract prohibited. The new person admitted is not the person with whom the insurer agreed.

The conditions of the policy are a part of the consideration. On account of the limitations expressed, and made a part of the contract, a lower rate of premium is charged for the risk. The insured agrees with the insurer that he will do, or refrain from doing, particularly designated things. When this agreement is not performed, there is a partial failure of the consideration, and the insurer will be relieved from the payment of a loss.

When a partnership is dissolved, and the property divided, the insurance is at an end. The promise of indemnity never follows the property, and will not be available to the individual members of a firm when separated.

A firm is changed by the introduction of a person who contributes nothing to capital invested. When such partner is admitted to the management on account of his skill, and enjoys a share of the profits, there is a change in title and possession, such as will avoid the insurance.

A partner may insure his undivided interest, but, if there is

other insurance by the firm, the fact must be disclosed; otherwise, there will be an avoidance as to both policies.

A stockholder in a corporation has an insurable interest, but one which can only be protected under a special form of policy.

A stockholder has no control of corporate affairs, and has no power to perform the conditions of the policy in regard to the care and protection of the property, either before or after a fire. He cannot produce books of account, etc., nor can he deliver to the insurer the damaged property at the "appraised value."

A person may conduct his business under a firm name that conceals wholly his own identity, and gives no intimation of the real proprietorship of the interest involved. Insurance taken in such firm name will be valid, and actual ownership need not be disclosed, unless particularly inquired about.

Except in states where prohibited by statutory law, a person or an association of persons may assume corporate names. They may buy and sell, sue and be sued, and do all things, under their collective title, concerning chattels, which they could do separately or if incorporated. The nature of such a compact is essentially that of a partnership, and each member of the compact or association will be personally liable for the debts of the concern.

CHAPTER VI.**SUBROGATION.**

- § 109. When the Insurer is Subrogated.
110. When the Mortgage is Canceled before the Fire the Insurer will not be Liable.
111. A Doubtful Doctrine—Double Payment.
112. When Insurance is Taken Separately by Both the Mortgagor and Mortgagee.
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§ 109. When the Insurer is Subrogated.

When a mortgagee has procured insurance on the mortgaged property in his own name, and has himself paid the premium, on pay-

ment of a loss the insurer will be subrogated to the mortgage and notes, or other evidences of debt which the insured holds against the mortgagor and the property insured. If, however, the money paid in settlement of a loss be less than the sum due, or to become due, on the mortgage, then the rights which the insurer will acquire by subrogation will be in subordination to those of the mortgagee for the continued security and ultimate payment of the balance of his debt. To illustrate, we will suppose A. owes B. \$3,000, and has given a mortgage on property valued at \$5,000 to secure payment. A part of the property mortgaged consists of a building valued at \$4,000; on this building B. procures an insurance for \$2,000. The building is subsequently wholly destroyed by fire, and the loss paid by the insurer to the full amount of its policy. The mortgagee has still security, it will be seen, on the land for \$1,000, and of this he cannot, of course, be deprived by the insurer in the enforcement of its right to subrogation. B. does not insure the property, but his interest in it as mortgagee, or, more properly, perhaps, his mortgage interest. A. is no party to this contract of insurance, and is entitled to none of the benefits derived from the policy taken by B. The burning of the building removes a large part of the security on which B. has relied for his protection, and, although he receives from the underwriter \$2,000, the payment of this sum does not extinguish any part of the debt which A. owes to B. The insurer stands to B. somewhat in the relation of an indorser. For an agreed premium it contracts that it will protect his security on the building to the amount of \$2,000, and, having paid this sum, it will be subrogated to the mortgage debt, and may proceed against A. in the same manner that B. could do to collect the unpaid debt, but not in any way to the prejudice of B.'s right to recover from A. the full amount his due. In this case B.'s security for the \$1,000 still due him on the mortgage cannot be impaired or qualified by any right which the insured has taken by subrogation. It has been held (and we do not assent to the doctrine) that the mortgagee cannot in a case of this kind be compelled to assign the whole mortgage debt to the insurer, it being for a larger amount than the sum paid in settlement of the loss, unless it is so stipulated in the policy; but the insurer is subrogated to so much of the debt secured as it has paid under its policy, and will be entitled to the benefits of so much of the remaining se-

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curety as will not be required for the protection of the interest that B. still retains in the debt owing from A.

§ 110. When the Mortgage is Canceled before the Fire the Insurer will not be Liable.

Should the debt be paid before the building burns, the insurer will not be liable, as the mortgagee has no insurable interest after payment and satisfaction of the mortgage. When the premium is paid by the mortgagee, and the policy has been issued in his name, containing no stipulation for rebuilding the property burned, should the insurer elect to rebuild, it will still be liable to the mortgagee. The right to rebuild, or replace property burned, cannot in any case be insisted upon by the insurer, unless it is secured by special contract stipulation.

§ 111. A Doubtful Doctrine—Double Payment. (See Sections 120, 123, and 124.)

The Massachusetts courts have held, in *Suffolk Fire Ins. Co. v. Boyden*,¹ that the payment of a total loss under a policy in favor of the mortgagee, and the offer on the part of the insurer to pay the amount remaining still due and to become due to the insured does not entitle it to an assignment of the mortgage debt. The policy in that case contained no stipulation requiring the mortgagee, in case of a loss under a policy where payment was for a less amount than the entire mortgage debt, to assign the securities to the insurer on an offer to pay the entire amount of the mortgage, and the court reached the conclusion that there was nothing in the equities of the case to create an obligation to make such assignment; that when such a duty existed, it must rest upon a distinct agreement.

The same court held, in the case of *King v. State Mut. Fire Ins. Co.*,² that where the premium was paid by and the policy issued to the mortgagee, the latter might collect from the insurer the amount of the policy, and afterwards collect his debt from the mortgagor, and the insurer was not entitled to be subrogated. We find no

¹ 9 Allen (Mass.) 123.

² 7 Cush. (Mass.) 1, 3 Benn. Fire Ins. Cas. 186.

courts giving their sanction to the doctrine of these decisions outside of Massachusetts. They are based upon a very strict construction of the contract, and their logic may well be challenged. It is difficult to find any principle of law or equity on which they can firmly rest.

§ 112. When Insurance is Taken Separately by Both Mortgagee and Mortgagor, it will not be Double Insurance within the Meaning of the Policy.
(See sections 119, 120, and 124.)

When the policy is paid for by the mortgagee, and written in his name, the owner of the property may be a stranger to the contract; and, should he take out a policy in his own name, the insurance procured by the mortgagee will not avoid the mortgagor's policy, under the condition which causes a forfeiture when other insurance is placed upon the property "without notice and consent" of the insurer. This has been held in many cases, and recognizes the fact—First, that the mortgagor or owner of the property is in no way privy to the contract into which the insurer has entered with the mortgagee; second, that the two insurances cover separate and distinct subjects. That of the owner relates to his interest in the property, and that of the mortgagee to his interest in the security. Nothing has been done by the mortgagor to create any right to the benefit of this insurance, and the courts have so held. The payment of the loss cannot be applied in extinguishing the mortgage debt, and does the matter stand any better as regards the mortgagee, who may have received from the underwriter, in payment of a loss on the property covered by his mortgage, a sum equal to the amount he is entitled to receive in full settlement of the debt, and then claims a right to hold the mortgagor the same as though no money had been paid him on account of the loss? May he receive two payments for one debt? This proposition is repugnant to justice and to law. Such an insurance would be speculative in its character, and opposed to public policy. There would frequently be a temptation placed before the mortgagee for the commission of a crime, when the mortgaged property was in separate parcels, and, as is often the case, of a value largely in excess of what is required to make the

security good. The destruction of the property by fire, or portions of it, would in such case result to the benefit of the mortgagee. This proposition, therefore, is so repugnant to public morals and to public policy that it ought not to receive the sanction of the courts. If the insurance is treated as only to protect the mortgage interest, as we think it should be, then, on payment of the loss, the insurer being subrogated to all the rights of the mortgagee to receive payment from the mortgagor, the obligation of the contract may be performed without violating the underlying principles of morality and law.

§ 113. Insurer can Insist upon Subrogation when Stipulated for.

The case of *Dick v. Franklin Fire Ins. Co.*³ furnishes a very clear and interesting discussion concerning several important questions that are presented in relation to the rights of the insurer and the insured, when the interest covered by the policy is that of a mortgagee. The policy in that suit insured F. A. Dick and Ben Farer, trustees of Isaiah B. Williamson, "against loss or damage by fire on their interest under deed of trust" in a certain building. The policy was for \$3,500, and the deed of trust was to secure a note for \$30,000. The deed of trust was conditioned that the grantor should keep the property insured for \$16,000, and, failing to do so, the holder of the trust deed was authorized to procure the insurance and pay the premiums, which should become a part of the debt secured by the deed of trust. The policy of insurance contained the following stipulation: "It is hereby agreed that in case of loss the assured shall assign to this company an interest in this deed of trust equal to the sum of loss paid under the policy, provided the said assignment shall in no wise prejudice the assured's claim under said deed of trust to recover the full amount of their loan and proper charges." After the occurrence of the fire, the insurer, the defendant company, offered to pay the amount of its policy if the plaintiffs would assign to it an interest in the deed of trust equal to the sum which was

³ 10 Mo. App. 376.

to be paid, but the plaintiffs refused to accept payment upon the condition proposed, among other things, for the reason that the stipulation in the contract in regard to the assignment was no part of the consideration, and, further, that the value of the property was less than the amount of the loan secured by the deed of trust, it having been sold under the provisions of the deed to Williamson, the highest bidder, for \$23,000. Of this sale, which appears to have been made under forms of law, the defendant had no notice until after it had taken place. The court declared the law to be that mortgagors and mortgagees hold separate and distinct interests, each of which can be insured independent of the other; that when the mortgagee insures his interest, and a loss occurs, which is paid by the insurer, in equity it is entitled to subrogation to the rights of the mortgagee as against the mortgagor, irrespective of any stipulation in the policy conferring such a right. We quote from the language of Tomlinson, J.:

"In a case like the present, it is clear that where the insured has contracted with the insurer for subrogation as one of the conditions on which it assumes the risk, the contract is good and will be enforced in the courts. * * * The fact that the deed of trust gave the trustees the right to insure the mortgaged property at the expense of the grantor, making the cost of the insurance an additional charge upon the premises; and providing that the insurance money collected in case of loss should be applied in rebuilding, * * * did not in any manner deprive the trustees of the right to effect an insurance upon their own interest, and of contracting with the insurer to subrogate the latter to their own rights under the deed of trust, * * * as a part of the consideration of the contract. They were entitled to insure for the benefit of the grantor, without a stipulation for subrogation. They were equally entitled to insure for the benefit of the cestui que trust, with such a stipulation. * * * The insurer may have known that the trustees had the right, under the deed of trust, to insure the granted premises for the joint benefit of the grantor in the deed and the beneficiary in the trust, and that any insurance money paid under such a contract of insurance would be applied in rebuilding. It may have known of this. The deed of trust may have been unfolded before the eyes of the agent when he

countersigned and delivered the policy, but, nevertheless, the fact remains that, knowing that the trustees had also the right to effect a separate insurance upon their interests as trustees, it offered them, for the stipulated premium, a policy insuring their interests, and not the interests of the grantor in the deed, nor any joint interest of themselves and the grantor, and it offered it to them upon the terms that, in case of loss, they (the trustees) should assign to it an interest in the deed of trust equal to the sum of loss paid under the policy, providing that such assignment should not prejudice the claim of the beneficiary in the trust to recover the full amount of his loss and proper charges. It offered, in terms, such an obligation upon such a condition, and in accepting the contract the parties accepted the conditions, and now they cannot hold it to the performance of the obligation without themselves discharging the condition. It is a case of mutual covenants. They cannot enforce one without conceding the other. It is no answer for them to say that 'we cannot grant you such an assignment, because the mortgaged premises are not worth the amount of our debt, less the amount you are liable to pay as insurers.' They could not thus set up their own opinion in avoidance of their own contract. That was to be changed by an event, and the insuring company had the right to participate in the shaping of the event. They had the right, not to an unqualified subrogation, but to subrogation with the qualification that it should not operate to the prejudice of the beneficiary in the deed of trust. An assignment of an interest in the deed of trust with such a proviso would have entitled them to be present at the sale which took place under the deed of trust, and to bid for the protection of their own interests. Their presence might have produced such competitive bidding as would have caused the premises to sell for the amount of the mortgage debt, in which case they would have been entitled to receive back from the parties what they had paid to them as insurance money. This right was denied them, and they had no actual notice of the sale and no opportunity to protect their interests. In view of these things, it cannot be said that the subrogation clause in the policy was immaterial, and no part of the consideration of the contract. This would not be said in any event, for by the terms of the contract the parties have agreed that it is material and that it is a part of the consideration."

The court further held that it was the evident intention of the parties to assign the debt, as well as the security for the debt, and that this should have been done.

The doctrine of this case, so far as the facts are analogous, is fully supported by the New York court of appeals in *Foster v. Van Reed*.⁴ Justice Miller, who wrote the opinion of the court, said: "It is difficult to see how the insurer can be deprived of the right to subrogation, when it is made a part of the contract that it shall enjoy such right."

In the case of *Norwich Fire Ins. Co. v. Boomer* ⁵ the court said, substantially, when the premium was paid by a mortgagee and insurance taken in his name, on payment of the loss by the insurer it would be subrogated to the right of the mortgagee against the debtor. The court declared the principle of law to be: "In such case the insurance would be considered as a further security of the debt, and on the familiar principle that a surety who pays a debt may resort to the principal debtor for the payment in such a case, the insurer might no doubt resort to the mortgagor for payment."

**§ 114. When Replacing the Property Destroyed does not
Excuse Payment to the Mortgagee.** (See
sections 119, 120, and 124.)

There is an old case (*Foster v. Equitable Mut. Fire Ins. Co.*)⁶ where it was held by the Massachusetts court, under a policy made to protect the interests of a mortgagee, that the restoration of the property destroyed did not relieve the insurer from the payment of the loss. The court said: "The fact that the injury caused by the fire to the property insured had been repaired by the owner of the right

⁴ 70 N. Y. 19, 25.

⁵ 52 Ill. 442; *Honore v. Insurance Co.*, 51 Ill. 409; *Carpenter v. Insurance Co.*, 16 Pet. 501 (a well-reasoned case); *Sussex Co. Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 555; *Stoughton v. Gas Co.*, 165 Pa. St. 428, 30 Atl. 1001; *Kip v. Receivers*, 4 Edw. Ch. (N. Y.) 86; *Anderson v. Insurance Co.*, 18 Ont. 355; *Bull v. Insurance Co.*, 14 Ont. 322, affirmed 15 Ont. App. 421; *Thomas v. Insurance Co.*, 43 Hun (N. Y.) 218; *Phenix Ins. Co. v. First Nat. Bank*, 85 Va. 765, 8 S. E. 719.

⁶ 2 Gray (Mass.) 216.

of redemption, before the commencement of the action, is wholly immaterial. The plaintiff had an insurable interest in the property. The defendants agreed to insure it against a loss by fire and a loss has occurred. The contingency contemplated by the contract has therefore arisen, and the defendants are bound to pay the amount of the damage. It is wholly immaterial to them, and constitutes no valid defence to this suit, that the property has been since repaired."

No other court, so far as we have been able to find, has ever accepted as satisfactory the logic of this decision. As before stated, the insurance was held only to protect the mortgagee. It was not intended to confer any benefit on the owner of the property. Its sole purpose was to indemnify the creditor, and to preserve unimpaired his security in the mortgaged property. When, therefore, the building covered by the policy had been restored to the condition in which it existed before the fire, the mortgagee had sustained no loss, and ought not to have recovered under his policy. In this instance, the insurance being held on the separate and independent interest of the mortgagee, the mortgagor and owner of the property could not demand that the money received from the insurer on the policy should be applied in payment of the mortgagee's⁷ debt. He was a stranger to the contract, and had no better right than any other stranger to receive the whole or any portion of such money. The mortgagee, therefore, would have two payments, one on the policy and another on the mortgage. This is bad law, and will be so regarded by the courts.

§ 115. When the Property has been Restored, the Insurer is Excused. (See sections 119, 120, and 123.)

A wiser and safer rule of construction was given by Judge Blodgett, in the case of *Friemansdorf v. Watertown Ins. Co.*⁸ The insurance there was for the benefit of the mortgagee, and there had been a replacement of the property. The court said: "There being no rule in the federal courts upon this question, and there being a

⁷ *King v. Insurance Co.*, 7 Cush. (Mass.) 1; *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen (Mass.) 123.

⁸ 9 Biss. 167, 1 Fed. 68.

conflict in the state courts, this court has the right to adopt such a rule as it considers most consonant with the principles of equity and practice; and I think the most satisfactory reasoning is that, as the only purpose of the policy is to prevent a diminution or impairment of the mortgagee's interest in the property, its capacity to pay the mortgagee's debt, if that remains unimpaired, and the property is as good or is made as good after the fire as it was before by reason of some other person's reparation, there is no right of action."

§ 116. When Contribution cannot be Claimed from Other Insurers on the Risk.

Where there are several policies on the same risk, all written in the name of the owner of the property, and one or more subsequently made payable to a mortgagee, with proper stipulation to fully protect the mortgagee from forfeiture on account of any act, neglect, or omission of the owner, and with the further covenant of subrogation to the insurer when it has paid a loss to the mortgagee (and there is no liability to the owner or mortgagor), the contract is independent, although the case was different at the time the insurance was written, and in payment of the loss neither class of companies can receive the benefit of contribution from the other.

This question was considered by the court in the case of *Hastings v. Westchester Fire Ins. Co.*⁹ As that case is stated, a Mrs. Stout owned a building, on which she had procured insurance to the amount of \$4,000 in the Lycoming Company and \$10,000 in the Westchester. One Hastings held a mortgage on the insured property for \$14,000, and, with the consent of Mrs. Stout, the policy of the Westchester Company was indorsed, "Loss, if any, payable to Hastings, mortgagee," and besides this indorsement there was attached to the policy the usual mortgage clause, providing in suitable form of words that the interests of the mortgagee in the policy should not be invalidated by any act or neglect of the mortgagor, and that the insurer should be subrogated on payment of loss, when it was claimed that no liability existed as to the owner or mortgagor. This special mortgage clause did not provide for contribution, although there was

⁹ 73 N. Y. 141, 7 Ins. Law J. 430.

a condition among the general provisions of the policy intended to secure that right, where there was other insurance concerned in the loss. The damage to the property was agreed to be \$9,000. The Lycoming paid of this four-fourteenths, but the mortgagee, Hastings, refused to accept payment from the Westchester on the same basis. The court held that the mortgage clause created a new contract, to which Hastings was a party; that he had no interest in the Lycoming policy; that the insurance secured to him under the special and subsequent agreement with the Westchester Company was independent; and that the mortgagee was entitled to receive payment of the loss in the same manner and on the same basis of computation as he would if there were no other insurance on the property.

§ 117. Unless Otherwise Stipulated, the Mortgagee and Payee will Have no Rights under the Policy Independent of the Mortgagor or Owner of the Property.

When a mortgagor procures insurance in his own name, and a loss occurs, the mortgagee can claim no benefits.¹⁰ If, however, the policy is indorsed, "Loss payable to the mortgagee," he is then entitled to receive any money which the insurer is liable to pay under the policy. But the making of the mortgagee the payee of the policy does not in any essential particular change the relations theretofore existing between the insurer and the mortgagor. The latter is still bound by the covenants of the contract, and any failure to perform the conditions precedent will discharge the insurer. The mortgagee can take no more than is due to the mortgagor, and if by reason of any act or neglect of the latter an avoidance has resulted, the former has no remedy.¹¹

§ 118. Who may Make Proofs of Loss.

It has, however, been held that when the mortgagor has failed or refused to make the stipulated "proofs of loss," they may be furnished

¹⁰ *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507; *Vandegraaff v. Medlock*, 3 Port. (Ala.) 389; *White v. Brown*, 2 Cush. (Mass.) 412.

¹¹ *Friemansdorf v. Insurance Co.*, 1 Fed. 68; *Hoxsie v. Insurance Co.*, 6 R. I. 517; *Cormier v. Insurance Co.*, 4 Pugs. & B. (N. B.) 526; *Baldwin v. Insurance Co.*, 60 N. H. 164.

by the mortgagee and a forfeiture prevented. When, however, the policy particularly designates that proofs must be made by the person originally insured, unless the property covered has been sold, and the policy assigned by the consent of the company, proofs cannot be made (in compliance with the terms of the policy) except by the person to whom the policy was issued.

If it is important to the underwriter that it may know the person it insures, so it is important that it may have an option in selecting the person with whom it will adjust claims for loss. Moral and business character is a quality of the highest consideration in either relation. Many fires result from fraud, and there has been a large number from purely accidental causes, where the claimant for loss has resorted to schemes of deception and fraud in presenting his proofs, stimulated with the hope of securing an adjustment by the computation of quantities or values on a fictitious basis. The insured, the owner of the property damaged or destroyed, is the person with whom the insurer is dealing, and it has a right to receive his sworn declarations, to traverse his statements, and to challenge his good faith, when warranted in doing so. This has been clearly provided for in the policy, and to substitute as sufficient the estimates and declarations of another contemplates changes so radical and important in the performance of contract obligations, as to imply an abandonment of the original intention of the parties. A contract of insurance is nowhere more personal than in respect to its provisions concerning the adjustment of claims. The insured must present his claim under oath. He must produce a magistrate's certificate as to his good faith, and, if required, must submit to a sworn examination. Each of these matters relates to the person of the insured, and the importance of this requirement is too obvious to need argument. The person insured may be fairly presumed to be in possession of the largest number of facts and the most reliable information in regard to the circumstances of the fire and the extent of the loss, and if there be a fraud suspected, the insurer cannot be denied the right which he has stipulated for, to meet face to face the one who alone would have a motive for the perpetration of a crime. To excuse, therefore, the insured, who may have secreted himself to avoid arrest, and compel the insurer to accept proofs and adjust the loss with one who may know nothing of the cause of the

fire, and who, in the preparation of the proofs, is acting under but little of the responsibility which would rest upon the insured in performing the same duty, would be a gross perversion of justice, and the setting aside of plain contract obligations.

Where, however, the policy is issued to the owner of the property, with direction that the loss be paid to a mortgagee, an action to recover on the policy will not be sustained, when brought in the name of the person owning the property, unless it is shown that he has permission of the mortgagee, or that the debt secured has been paid. An action, however, cannot be defeated through the arbitrary or contumacious refusal of the mortgagee to give his consent. The mortgagor has an interest in securing payment of the loss, as the money collected will apply in reducing the debt secured by the mortgage. On refusal or neglect, therefore, of the mortgagee to bring suit, either in his own name or that of the mortgagee, the latter may do so, making the mortgagee party defendant.

In the case of *Graves v. American Live-Stock Ins. Co.*¹² the right of a mortgagor to bring suit on a policy without the consent of the mortgagee, to whom the loss was made payable, was carefully considered, and decided adversely to the contention of plaintiff.

On the trial of the case it was not shown that the mortgage indebtedness was wholly paid. The suit was brought by the insured and mortgagor, without the consent of the mortgagee, to whom loss, if any, was made payable by express stipulation on the face of the policy. The mortgagee was made party defendant, but it was not shown by the return to the court that he had ever been served with summons or had appeared in the case. The court said: "There is absolutely nothing in the record from which it can be gathered that either Huntington or Ross (mortgagees) had been advised of the pendency of an action on the policy, of which they were named as defendants. It cannot be presumed. * * * The plaintiff's right to recover in an action against the insurance company must be made to depend upon his right to the money as against the mortgagee. It depended upon his having paid the debt, or in having in some other proper manner satisfied and discharged the incumbrance, or, possibly, he could have recovered had he alleged in his complaint and

shown upon the trial that the mortgagee had consented and authorized a recovery by the plaintiff (mortgagor), but the right of the latter could not be made to depend solely upon the fact that no claim had been made or action instituted by the mortgagee within the period of time prescribed by the terms of the policy for the presentation of a claim for loss or the bringing of an action."

§ 119. When Insurer will not be Liable under Mortgage Clause.

A policy of insurance that has become void for any reason will not gain new life by having attached the special agreement known as the "mortgage clause." This agreement admits to the contract a third party, who has an insurable interest by reason of his relations to the property insured growing out of the mortgage indebtedness. It is generally stipulated that "the policy shall not be invalidated as to the interest of the mortgagee by any act or neglect of the mortgagor or owner of the property." The consideration for this special promise, made by the insurer to the mortgagee, is the premium paid for the policy, either by the mortgagee or mortgagor, and without such consideration this promise could not be enforced. When, because of a breach of the policy conditions, the contract is at an end and null, the premium paid is forfeited, and there is no right of rescission left; all obligations on the part of the insurer having been terminated and canceled by the act of the insured. When this occurs, the policy cannot be revived without a new agreement of the parties, supported by a new consideration.¹³

If, then, after forfeiture has come to exist, a clause is attached to the policy, as before stated, for the benefit of a mortgagee, it will not have the effect to create any rights in his behalf that can be enforced, as the promises expressed in the supplemental contract do not rest on any consideration.

¹³ Carey v. Insurance Co., 84 Wis. 80, 54 N. W. 18; Boyd v. Insurance Co., 90 Tenn. 212, 16 S. W. 470; Brink v. Insurance Co., 70 N. Y. 593; New v. Insurance Co., 5 Ind. App. 82, 31 N. E. 475; Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379; Moore v. Insurance Co., 62 N. H. 240; 1 May. Ins. (3d Ed.) § 70C; New York Cent. Ins. Co. v. Watson, 23 Mich., at page 488.

In *Davis v. German American Ins. Co.*¹⁴ the policy was written in the name of one Putney, who owned the property. Putney afterwards sold to Henry Pearsons. Of this sale the plaintiff had knowledge, but the defendant was not informed. By reason of the sale defendant was, of course, relieved from any liability under the policy. The insured, having parted with his interest in the property, had sustained no loss on account of the fire, and, the purchaser having acquired no right to the policy by assignment or otherwise, and, besides, the policy distinctly providing for forfeiture in case of sale without notice and consent, the defendant was clearly let out, unless held to the mortgagee by virtue of an indorsement on the policy made by the defendant's agent at the mortgagee's request. There had been a foreclosure of the mortgage, and with the distinct purpose of protecting the purchaser at the foreclosure sale, the policy was indorsed as follows: "It is understood and agreed that this policy shall attach and cover their interests as such." Then follows a mortgage waiver clause in the usual form. The court held that this promise on the part of the defendant to insure failed to give any right to plaintiff because it was without consideration. The theory upon which this decision rests is that, the policy being void by reason of the sale of Putney to Pearsons, there was no right remaining to be appropriated by the mortgagee; that, the forfeiture being absolute, relations could be established between the insurance company and the mortgagee only by the terms of a new contract, supported by a new consideration.

In *Graham v. Firemen's Ins. Co.*¹⁵ the court found that there had been such misrepresentation in the application as to avoid policy, but there was attached a mortgage clause which stipulated that the insurance as to the interests of the mortgagee should not be invalidated on account of any act or neglect of the mortgagor or owner of the property. The court said: "A policy obtained through misrepresentation as to the owner cannot fairly be considered as embraced within the meaning of the clause referred to, nor can such misrepresentation be regarded of itself as an act or neglect, within the terms of the policy."

This question is discussed by the United States circuit court of

¹⁴ 135 Mass. 251.

¹⁵ 87 N. Y. 69, 11 Ins. Law J. 64.

appeals, in the case of *Syndicate Ins. Co. v. Bohn*,¹⁶ and a conclusion reached directly opposed to that of the New York and Massachusetts courts here referred to. In this case the facts show that, at the inception of the insurance and the attaching of the mortgage clause, the policy was valid. Some months afterwards the property was sold without knowledge of either the insurer or mortgagee. This sale created a forfeiture as to Bohn, the mortgagor. The policy in suit was subsequently twice renewed without any disclosure as to the change of title. There was, it appears, a continuous insurance with the plaintiff company from the issuance of the first policy mentioned until the time of the fire. The court held that the insurance as to defendant, Bohn, was invalidated, but good as to the mortgagee. The policy being valid when the mortgage clause was attached, there was a good consideration to support the separate agreement between the insurer and mortgagee, and, if the insurance is treated as continuous on account of the several renewals, the conclusion of the court would be logical so far as it refers to the questions involved in that case, but it should be carefully observed that each renewal of the policy signifies a new contract. It may be that it will continue in the same terms, but there will always be a new consideration. The better doctrine is that the old agreement is contemporaneous and co-existent with the consideration which supports it; that both terminate at the same moment; that the renewal means a new and distinct contract, whether another policy is issued or not.¹⁷

¹⁶ 12 C. C. A. 531, 65 Fed. 165.

¹⁷ *Brady v. Insurance Co.*, 11 Mich. 425; *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich. 289; *King v. Insurance Co.*, 58 Wis. 508, 17 N. W. 297. "The renewal of the policy is in effect a new contract, on the same terms and conditions as in the original policy." *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Ormsby v. Insurance Co.*, 5 S. D. 72, 58 N. W. 301.

In *American Building & Loan Ass'n v. Farmers' Ins. Co.*, 11 Wash. 619, 40 Pac. 125, the court declared that, while the mortgage clause was a part of the contract, it was not a complete contract of itself, that the immunities stipulated for referred only to particular clauses of the policy, and that all other stipulations and conditions bound both the owner and mortgagee alike. As to the time within which suit can be brought, the court said it was a condition of the policy, from which the mortgagee was not exempt by the special clause, relieving him from the "acts and omissions" of the mortgagor. See *Syndicate Ins. Co. v. Bohn*, where the mortgage clause is held to be an independent and complete contract. 12 C. C. A., at page 531, and 65 Fed., at page 177.

The mortgage clause is a part of the policy to which it is attached. Both terminate at the same moment; that is, when the policy expires by its own terms. The separate agreement with the mortgagee also expires. It is folly to regard the mortgage clause as an independent contract. It is independent in nothing except in regard to the conditions to be performed, under penalty of forfeiture, by the owner or mortgagor.

There are no promises made by the insurer to pay a loss that will be found expressed in the mortgage clause. As a distinct and independent contract it will impose no burdens upon the insurer, nor will it be of any value to the mortgagee. It is only as a part of the policy that the mortgage clause has any validity. The property insured, the amount covered, and the time when the policy begins and ends are nowhere referred to in the special agreement between the insurance company and the mortgagee. A contract of insurance which omits any mention of these very essential particulars cannot be enforced. The independent character of the mortgage clause contract consists in nothing important outside of the promises that the policy, so far as the interest of the mortgagee is concerned, shall not be invalidated by any act or neglect of the mortgagor or owner of the property. It seems, therefore, that the United States circuit court of appeals in this case has been somewhat too broad in its application of legal principles in the construction of this tripartite agreement between the insurance company, the owner of the property, and the mortgagee. The court said: "The inference is irresistible that they intended to, and that they did, thereby agree that no act or neglect of the mortgagors, unknown to the mortgagees, whether prior or subsequent to the date of this contract, should avoid it. Moreover, these insurance companies cannot now be compelled to say that these contracts were void in their inception as to the interests of the mortgagee."

§ 120. When Policy is Void as to Mortgagor and Valid as to Mortgagee.

The case of *Springfield Fire & Marine Ins. Co. v. Brown*¹⁸ presents another point of interest in the general discussion of this sub-

¹⁸ 1 Ins. Law J. 57.

ject. The policy there was issued to the owner of the property, with the stipulation that loss should be paid to mortgagee, and, as to the latter, the policy contained a provision that it "should not be invalidated by any act or neglect of the mortgagor or owner of the property." Subsequently, and during the term of the insurance, the insured property was sold without the consent of the insurer, and in contravention of the terms of the policy, on account of which the company was discharged from any liability as to the owner. The mortgagee, having been paid the loss, assigned the mortgage to the insurer, and in a suit to foreclose it was held that the mortgagor could not require that the money paid to the mortgagee in settlement of the loss should be applied in payment of his debt. There was, in this case, an agreement, expressed in the policy, that when any loss should be paid to the mortgagee, and there was no liability as to the mortgagor, the mortgage should be assigned to the insurer. The court held that it was competent for the parties to so agree, notwithstanding the mortgage authorized the mortgagee to insure at the expense of the mortgagor; that the mortgagee was at liberty to insure for his own benefit, and to make it a part of the consideration that, in case of the payment of a loss, he would assign the mortgage and the notes which it was made to secure, to the company, on paying the loss.

§ 121. When Mortgagor may Recover.

When the policy is issued in name of the mortgagee, but at the charge of mortgagor, the latter may recover a loss in his own name, if the mortgage debt is paid before a right of action arises on the policy. It is immaterial whether the mortgage is satisfied before or after the occurrence of loss. In a case of this kind, the mortgagor, on payment of the debt, is held to be subrogated to the right of mortgagee, under the terms of the policy. In *Phoenix Assur. Co. v. Allison* ¹⁹ the policy was issued to mortgagee, but the owner of the property had paid the premium, and after the loss he also paid the mortgage debt. Suit was brought to recover by the mortgagee, who had ceased to have any interest in the matter, and it was held by the

¹⁹ (Tex. Civ. App.) 27 S. W. 894.

Texas court of civil appeals that no right of action vested in plaintiffs. The court said: "Whether the mortgagee procures the policy, paying the premium without authority of the mortgagor, or whether it is procured by the mortgagor in the name of the mortgagee, and the debt is paid, the insurers are not liable to the mortgagee, because in the one case payment of the debt and extinguishment of the mortgage determine all efficacy of the policy, and in the other the mortgagor paying the debt is subrogated, and he alone should sue, or, in other words, the underwriters would be responsible to him and not to the mortgagee."

§ 122. Contribution under Mortgage Clause.

In *Eddy v. London Assur. Corp.*²⁰ the plaintiff had procured insurance to protect mortgagee. To these policies was attached the New York standard waiver clause, in some instances providing for full contribution. Subsequently other insurance was obtained by plaintiff, which was not made payable to mortgagee. On the occurrence of a loss, companies issuing policies of the first class demanded that the loss be apportioned pro rata among all the policies insuring the property, whether payable to the mortgagee or not. The last insurance mentioned was for the sole benefit of plaintiff, and without the consent or even the knowledge of the mortgagee. It was a part of the mortgage clause referred to that "this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property. * * * In case of any other insurance upon the within-described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise."

It was under the terms of this special stipulation that the insurers of the mortgagee claimed contribution from all the policies on the risk, but the court held that this very distinct provision concerning what policies should be contributory must be considered as subordi-

²⁰ 143 N. Y. 311, 38 N. E. 307.

nate to the antecedent provision, intended to protect the mortgagee from "any act or neglect of the mortgagor or owner of the property." It reasoned, with force, that, as the last policies were procured by the mortgagor for his own benefit, the interest of the mortgagee could not by such act be dissipated through the process of the proposed contribution. The court said: "The act of obtaining this additional insurance was the act of the owner, and it was unknown to the mortgagee, and, of course, not consented to by him. The additional insurance could by no possibility benefit him, as it was not upon any interest of his in the property. He could not, therefore, resort to any of these additional policies for his indemnity. It is not a case of contribution in any sense, but simply one on the insurer's theory of diminution of their liability, caused by the act of the owner, and unknown, and with no possible corresponding benefit, to the mortgagee." The court found that the stipulations in this independent and separate clause were repugnant to one another, and to meet the difficulties applied the common rule of construction that repugnancies of language must be reconciled, consistent with the general purpose of the contract. In this case the obvious intention was to indemnify the mortgagee, and this intention would be defeated in part by adopting the principle of apportionment insisted upon by the defendants. While there can be no doubt that Lord Bacon was correct when saying that "judges should beware of hard constructions and strained inferences, for there is no worse torture than the torture of the law," it is equally certain that persons charged with the important duty of formulating insurance contracts should be required to perform their work with such measure of intelligence as to relieve the courts from the difficult and unpleasant duty of reconciling repugnancies and qualifying vital interests by construction.

A different rule of construction, and one giving better effect to important stipulations of the policy, was laid down by the United States circuit court of appeals in the case of *Hartford Fire Ins. Co. v. Williams*.²¹ There was attached to the policy a mortgage clause providing for full contribution. After the policy in suit was issued, the mortgagor procured other insurance without the knowledge of

²¹ 11 C. C. A. 503, 63 Fed. 925.

the mortgagee. The court held that the mortgagee could not refuse contribution on account of the subsequent insurance, and that the provision of the mortgage clause, that the policy should not be invalidated by any act of the mortgagor, was qualified by the stipulation in regard to contribution.

§ 123. Application of the Mortgage Clause.

The interest of the mortgagee is so far recognized in particular cases that, besides being named as the payee, there is attached to the policy a special stipulation for his better protection. This stipulation is to the effect that the policy shall not be invalidated as to the mortgagee's interest because of any act or neglect of the mortgagor. For this surrender by the insurer of important contract rights expressed in the policy, which are either annulled or qualified by the stipulation, the mortgagee promises to give notice of any change in the ownership of the property or increase of hazard which shall come to his knowledge, etc. This clause, when attached by the consent of the original parties, introduces new elements, and, in a qualified sense, other and independent interests, into the contract. It is, by a new agreement, enlarged, so as to include the mortgagee, who, by the special terms of his incorporation, is conditionally relieved from forfeitures which may result from any act or neglect of the mortgagor. In no other respect, however, are the terms of the policy to be construed differently in regard to the mortgagee than in regard to the mortgagor, and, should a forfeiture occur as to the mortgagor, by sale or otherwise, the mortgagee will continue the only person insured, and, a fire subsequently happening, it will become his duty to perform all things under the terms of the policy subsequent to loss. The mortgagee must then claim, if claim is made by anyone. He is the "assured," and the only person under the terms of the policy who sustains towards the insurance company any beneficial relations, and on him by mutual agreement falls the duty of performance. The insurer assumes no duty to pay him anything except what may be due under the policy, from the conditions of which he is specifically relieved from certain things, to wit, forfeitures because of "the occupation of the premises for purposes more hazardous than are permitted by the policy," and from

such forfeitures as, by the policy conditions, may result from the act or neglect of the owner of the property and mortgagor. But it will be observed that this grace is contingent, and in respect to all other conditions and stipulations the mortgagee is as firmly bound as the mortgagor.

The mortgage clause has no effect whatever, except as it is a part of the policy, and the agreement it contains, to give the insurer notice of any change of title or ownership which shall come to his knowledge, is a condition and promissory warranty. Under the forms of policy now in general use, "the stipulations, conditions, limitations, and requirements of the policy are expressly made a part of the consideration," on which rests the promise to pay in case of loss. This construction of the contract was distinctly denied by the supreme court of Nebraska, in the case of Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co.²² In that case the person first insured sold to another, without knowledge of the Phenix Company, but with knowledge to the defendant in error. The loss, if any, was payable to the latter, under the terms of a mortgage clause, in form substantially like the one considered. The opinion was written by Commissioner Ragan, and commits the court of that state to the illogical doctrine that the special provisions attached to the policy, for the benefit of the mortgagee, constitute a contract which may be enforced for the collection of a loss claim, independent of the promises and conditions of the policy, of which it has elsewhere been uniformly held a part. The Nebraska court further declared that the stipulation, to give the insurer notice of any change of ownership that should come to the knowledge of the mortgagee, was not a condition, that it was immaterial, and a default in performance would not prevent recovery.

The special promise made to the mortgagee, as expressed in the clause referred to, if contemporaneous with the writing of the policy, is obviously as much a part as any other promise or stipulation contained in the contract, and the agreements to perform will all rest upon the consideration originally paid and stipulated for. If the agreement for the benefit of the mortgagee is a subsequent arrangement, the special clause being attached to the policy after its de-

²² 41 Neb. 834, 60 N. W. 133.

livery, while it must still be considered as a stipulation collateral to the principal contract, it is not clear that the separate and distinct interests can be so identified that the promise to the mortgagee will find support in the consideration originally moving from the mortgagor and owner of the property insured. The rule of law is that a promise will not rest on a past consideration, the presumption being that as to what has been done, in consideration and performance, there has been a balancing of agreements, and that there remains no unsatisfied equities to form the basis of new obligations.²³ Of course, the mortgage clause recognizes in the mortgagee one having independent rights, and, when he is admitted to participate in the protection of the policy, he is also bound by all its conditions, except those from which he is especially relieved by the agreements which made him a party to the tripartite contract. Certainly the one here holding the "third estate" cannot be prejudiced by "any act or neglect" of the mortgagor.

In *Hastings v. Westchester Fire Ins. Co.*²⁴ the facts, briefly restated, are that there were two policies insuring the property, one for \$4,000 in the Lycoming and the other for \$10,000 in the Westchester. To the last-named policy was attached the usual form of mortgage clause, making loss payable to plaintiff, Hastings. On adjustment it was found that the property was damaged to the amount of \$9,832.52, and in settlement the defendant company claimed pro rata contribution from the Lycoming. This the mortgagee, Hastings, would not permit, as he had no interest in the Lycoming policy. The New York court sustained the plaintiff's contention by a bare majority, Justices Allen, Folger, and Andrews dissenting. From the separate opinion of Rapallo, J., I quote as follows: "I think that the intent of this clause was that in case, by reason of any act of the mortgagor or owner, the company should have a defense against any claim on their part for a loss, the policy should, nevertheless, protect the interest of the mortgagees, and operate as an independent insurance of that interest, and indemnify them against loss resulting from fire, without regard to the rights of the mortgagor under the policy, and that, to effectuate that intention, we should hold that,

²³ *Johnston v. Johnston's Adm'r*, 31 Pa. St. 450; *Chamberlin v. Whitford*, 102 Mass. 448; *Summers v. Vaughan*, 35 Ind. 323; 3 Am. & Eng. Enc. Law, 838.

²⁴ 73 N. Y. 141.

as against the mortgagees, the defendant cannot set up any defense based upon any act or neglect of the mortgagors, whether committed before or after the issuing of the policy, or the making of the agreement between the company and the mortgagee."

This is a plain statement of the respective rights of all the parties to the contract, and, as the procuring of the additional insurance in the Lycoming company was the act of the mortgagor, such act must be treated as subject to the terms of the protecting clause, if injuriously affecting the interests of the mortgagee, as it clearly would in the event that the two insuring companies were allowed to pay the loss on the basis of pro rata contribution, the mortgagee receiving only ten-fourteenths of the amount which he was entitled to have, under the terms of the agreement. The prejudicial act was that of a mortgagor, and comes directly within the terms of the stipulation.

If the promises of the mortgagee contained in the special clause are treated as conditions or warranties, they must be enforced, and any inquiry on the part of the court concerning their materiality will be an impertinence, as that important question has been finally determined by agreement of the parties interested.

It was held, in *Byers v. Farmers' Ins. Co.*,²⁵ that "warranties are conditions precedent to a valid policy, whether such conditions are material or not, if the parties have regarded them as material, and clearly intended them to be so treated. In such cases, when the parties have stipulated that certain things should constitute conditions, courts, as a general rule, will not inquire whether they are material to the risk or not. It is enough to know that they influence the risk, and that the parties have fairly made them the basis of the contract."

In *Blumer v. Phoenix Ins. Co.*,²⁶ the supreme court of Wisconsin defines in very clear and forcible language the legal effect of this class of stipulations. It says: "Stipulations in the policy, or, what is the same thing, stipulations in some other writing, which the parties expressly agreed shall be a part of the policy, although not inserted in it, whether the same are statements of existing facts, or that certain acts shall thereafter be done, or a certain condition of things continued, are, in general, part of the contract, and express

²⁵ 35 Ohio St. 606.

²⁶ 45 Wis. 622.

warranties, unless it can fairly be gathered from the whole contract that the parties did not so intend. A breach of any such warranty,—at least any substantial breach of it,—whether material to the risk or not, will defeat a recovery on the policy.”²⁷

In *Ormsby v. Phenix Ins. Co.*²⁸ the policy was issued to one Simons, and to secure a loan to the American Investment Company the property was mortgaged, and a mortgage clause in usual form attached to the policy. Besides this incumbrance, there was a second mortgage to secure the payment of certain commissions or fees. Simons subsequently conveyed the property to one Fowler, without notice to the insurer, causing a forfeiture of all rights under the policy as to the owner and mortgagor. Afterwards, without knowledge of the defendant company, but with knowledge of plaintiff, the second mortgage was foreclosed, and the property sold to satisfy the judgment. The defendant company set out, as a defense to the action, the stipulations in mortgage clause concerning notice of sale or transfer. The court held, in a very carefully considered opinion, that the stipulations in the mortgage clause, in regard to notice of sale and increase of hazard, were conditions, and not covenants. It is stated in the syllabus “that a failure on the part of the mortgagees to comply with the conditions of the mortgage-clause agreements suspends the operation of the same, and leaves in force and effect the stipulations in the policy as to the acts on the part of the owner or mortgagor that will operate to forfeit the policy.” “The evident design and the legal effect of such conditions is to require the mortgagee to notify the insurer of any change of ownership or increase of hazard which shall come to his knowledge, as a condition of continuing such stipulations in force.”

I quote from the opinion as follows: “Therefore the clause in the

²⁷ *Jeffries v. Insurance Co.*, 22 Wall. 47; *Shensgaard v. Insurance Co.*, 50 Minn. 429, 52 N. W. 910; *Fidelity Mut. Life Ass'n of Philadelphia v. Ficklin*, 74 Md. 172, 21 Atl. 680, and 23 Atl. 197; *Clemans v. Society*, 131 N. Y. 485, 30 N. E. 496; *Brooks v. Insurance Co.*, 11 Mo. App. 349; *Mers v. Insurance Co.*, 68 Mo. 131; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Johnson v. Insurance Co.*, 1 N. D. 167, 45 N. W. 799; *First Nat. Bank of Ballston Spa v. President, etc., of Ins. Co. of North America*, 50 N. Y. 45.

²⁸ 5 S. D. 72, 58 N. W. 301.

mortgage contract, that the insurance as to the interest of the mortgagee should not be invalidated as to any act or neglect of the mortgagor or owner of the property insured, ceases to be operative whenever there is a change of ownership or increase of hazard that comes to the knowledge of such mortgagee, and he fails or neglects to give notice of the same to the insurer, and have permission for such change of ownership or increase of hazard indorsed on the policy. It is only upon compliance with these conditions that the insurer has agreed to so suspend the original stipulations in the policy. Therefore, if, in the case at bar, there was a change in ownership of the property insured, of which the plaintiff, Mary F. Crosby, through her agent or agents (Ormsby), had knowledge, but of which she failed or neglected to give notice to the defendant, and have permission for such change of ownership indorsed upon the policy, the first clause in the mortgage agreement ceased to be operative as to her, and she therefore held her insurance subject to the original terms of the policy. The stipulations in the original policy were only suspended, as to her, upon the express condition that she should comply with the terms of the original mortgage-clause agreement; and when she failed to comply with the terms of that agreement the stipulations in the original policy came into force, and remained in force until the stipulations in such agreement were complied with."

The Dakota court has, as I think, with excellent reason, construed the promise of the insurer, in the first part of the mortgage clause, to relieve the mortgagee from such forfeitures as might result under the terms of the policy by reason of any act or neglect of the mortgagor, to be conditioned on the mortgagee giving notice of any changes of ownership that should come to his knowledge, and that he should, on demand, pay for any increase of hazard, etc., and that failure to perform on the part of the mortgagee excused the insurer from its special engagements in his behalf, and left him with no other or greater right under the policy than to receive any money in settlement of loss that might be due to the mortgagor.

A mortgagee has no interest in a policy of insurance, procured by the mortgagor, by reason of his relations to the property. While he has an insurable interest, he can claim no benefits from the policy which the mortgagor has obtained for his own use. When he is

made the payee of such policy, it is by the agreement of parties.²⁹

When the policy is written that the loss, if any, must be paid to a mortgagee, as his interest may appear, and after the fire it is shown that such interest exceeds the amount which the insurer is liable to pay, the mortgagee may bring suit in his own name to recover.³⁰ But if the whole sum of the mortgage indebtedness is less than the loss for which the insurer is liable, then suit to recover must be brought in the names of both the owner of the property and the mortgagee.³¹

When the policy is written or indorsed so as to authorize the insurer to pay the loss to the mortgagee without reserve or qualification, the mortgagee may bring suit without joining the mortgagor.³² So, too, if the mortgagee procures an insurance to protect his own interest only, and the mortgagor is subjected to no charge on account of the premium, any money received in payment of loss will not be applied for the benefit of the mortgagor, and the insurer will be entitled to subrogation.³³

²⁹ Mortgagee has no rights to a policy, unless he acquires them by the stipulation of the parties. Schwab Bros. owned the property and procured the policy, which was made payable in event of loss to one Kase. There was attached a waiver clause. Kase sold mortgage to Headly, but his interest as payee of policy was not assigned until after the fire. Held that, as Kase had suffered no loss, he could take nothing; that Headly had acquired no rights in the policy; that, the contract being personal, there could be no recovery. *Kase v. Insurance Co.* (N. J. Sup.) 32 Atl. 1057; *Carter v. Rockett*, 8 Paige (N. Y.) 437; *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Pet. 507; *Vandegraaff v. Medlock*, 3 Port. (Ala.) 380; *White v. Brown*, 2 Cush. (Mass.) 412.

³⁰ *Maxcy v. Insurance Co.*, 54 Minn. 272, 55 N. W. 1130; *Donaldson v. Insurance Co.*, 95 Tenn. 280, 32 S. W. 251; *Ermentrout v. Insurance Co.*, 60 Minn. 418, 62 N. W. 543; *Hammel v. Insurance Co.*, 50 Wis. 240, 6 N. W. 805; *Meriden Sav. Bank v. Home Mut. Fire Ins. Co.*, 50 Conn. 396, 12 Ins. Law J. 620. See *Williamson v. Insurance Co.*, 86 Wis. 393, 57 N. W. 46, where a different ruling was had.

³¹ *Fire Ins. Cos. v. Felrath*, 77 Ala. 194; *Donaldson v. Insurance Co.*, supra; *Carberry v. Insurance Co.*, 86 Wis. 323, 56 N. W. 920.

³² *Donaldson v. Insurance Co.*, supra.

³³ *McIntire v. Plaisted*, 68 Me. 363, at page 365; *Burton v. Insurance Co.*, 12 Grant (U. C.) 156.

§ 124. Mortgage Clause will not Protect Mortgagee While Acting in Bad Faith.

A loss was payable to a mortgagee, under a waiver clause containing the usual provisions relieving the trustee or mortgagee from forfeitures arising from any omission or neglect on the part of the owner or mortgagor. It was in evidence at the trial that the insurance was procured by the mortgagor for the mortgagee, and that, in the performance of this service, the former had acted as agent of the latter. It was also shown at the trial that the amount of incumbrances on the property had been misrepresented.³⁴ The court

³⁴*American Cent. Ins. Co. v. Cowan* (Tex. Civ. App.) 34 S. W. 460; *Hanover Fire Ins. Co. v. National Exch. Bank* (Tex. Civ. App.) 34 S. W. 333. In this case to the policy was attached a waiver or mortgage clause in the usual form. The premium was paid by the mortgagor. In addition to the mortgage for the benefit of which this insurance was procured, there was another incumbrance in the sum of \$16,500. This was in existence at the time the insurance was effected, but the fact was not disclosed. It was held that the concealment of this incumbrance was a fraud on the insurer; that the policy, by reason of such fraud, was never a valid and subsisting contract; that the only right or benefit enforceable by the mortgagee came to exist through the mortgagor, and, that act being fraudulent, the mortgagee could take nothing.

The importance of the discussion justifies the presentation, as a part of this note, of a full statement of the reasons on which the court based its opinion. Lightfoot, C. J. said:

"The first assignment of error presented by appellants is as follows: 'The court erred in its second conclusion of law, which reads as follows: "The action of Cowan in concealing the incumbrance did not and could not affect the rights of the defendant Security Mortgage & Trust Company to recover the proceeds of the policy, because the mortgage clause attached to the policy provided, in express terms, that no act or neglect on the part of Cowan, the assured, should invalidate the mortgage as to the interest of the mortgagee, the Security Mortgage & Trust Company." First. Because said mortgage clause applies only to acts and neglect subsequent to the execution of the policy with the mortgage clause attached, and the fraud of J. B. Cowan in the procurement of the policy was prior, and not subsequent, to its execution, and prevented said policy from ever becoming a valid policy. Second. Because said mortgage company could not avail itself of the benefit of Cowan's acts in its behalf, in procuring said policy to be issued with said mortgage clause attached, and at the same time avoid responsibility of the fraud by which said policy was procured.' This assignment is well taken. It is

said: "The mortgage clause protects the mortgagee against the acts or neglect of the owner or mortgagor, and not against its own neglect or wrong-doing. The policy was void on account of the misrepresentation of Cowan [mortgagor] as to the incumbrances on the property."

manifest from the terms of the contract that the expression in the mortgage clause, that the insurance 'shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property,' etc., was not intended to annul the other express provisions under which the contract should become valid in the first instance. The fraudulent concealment of a fact so material to the risk itself, which fact was expressly provided against on the face of the policy, and a knowledge of which would have stopped the issuance of the policy, prevented it from becoming a valid contract in favor of the assured, or the party for whose security it provided. The doctrine is well established in this state that A., for a consideration paid by him, may make a contract with B., for the benefit of C., and the latter will have a right of action to enforce it. *Spann v. Cochran*, 63 Tex. 242; *McCown v. Schrimpf*, 21 Tex. 27; Story, Cont. § 451b. But, if the contract was obtained by a fraudulent device of A., the person for whose benefit he fraudulently obtained it can gain no higher right than A. held, and, if the contract is void as to him, it is void as to his beneficiary. *Heath v. Coreth* (Tex. Civ. App.) 32 S. W. 56. We are referred by the learned counsel for appellee to the case of *Hastings v. Insurance Co.*, 73 N. Y. 141, to sustain the doctrine that the mortgage clause created a separate contract in favor of the mortgagee, which cannot be defeated by a fraud on the part of the insured in the creation of the contract. That case does not sustain the position. It is true that the mortgage clause in that case was similar to this one. The policy was taken out by Mrs. Stone, which provided on its face as follows: 'Other insurance permitted.' After the loss it was shown that there was other insurance amounting to \$4,000, and it was contended by the defendant company, not that the policy sued on was void by reason of such additional insurance, or that such additional insurance was prohibited, but that it was entitled to share the loss pro rata with the other company. The court held that, as to the mortgagee, this could not be done. Here the policy, on its face, provides that, if the insured shall be guilty of any concealment of a material fact, the 'policy shall not become valid,' and, if the property be incumbered by a lien, the policy 'shall be void.' At the time the policy was taken out, the property was incumbered with a lien for a large amount, which was material, and was concealed. The mortgage company, in accepting the security attempted to be obtained for it by the insured, could not escape the express conditions upon which the contract should become valid. In the more recent decision of *Graham v. Insurance Co.*, 87 N. Y. 69, the supreme court of that state held that a similar mortgage clause attached

When the owner and mortgagor obtains insurance, and has the policy indorsed, "Loss, if any, payable to mortgagee," but requires no special stipulations for the benefit of mortgagee, the undertaking to pay loss to the holder of mortgage is "collateral, and dependent upon the principal undertaking, and if there has been a breach of the conditions of the policy by the mortgagor the mortgagee cannot recover." ³⁵

to a policy did not prevent an inquiry into a material misrepresentation made by the insured at the time the policy was obtained; and notwithstanding the case of *Hastings v. Insurance Co.*, above referred to, was specially invoked, the court held that the policy was void. See, also, *Cole v. Insurance Co.*, 99 N. Y. 37, 1 N. E. 38; 2 May, Ins. p. 1021, § 452d (which refers to *Omnium Securities Co. v. Canada Fire & Mutual Ins. Co.*, 1 Ont. 494, not accessible to us); *Smith v. Insurance Co.*, 17 Pa. St. 253; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578; *Ellis v. Insurance Co.*, 68 Iowa, 578, 27 N. W. 762; *Hamblet v. Insurance Co.*, 36 Fed. 118; *Davis v. Insurance Co.*, 135 Mass. 251; *Friemansdorf v. Insurance Co.*, 1 Fed. 68; *Hoxsie v. Insurance Co.*, 6 R. I. 517. The negotiation in this case seems to have been wholly between Cowan and the insurance companies. He paid the premium, and had the mortgage clause attached to the policy. In doing this he acted for and on behalf of the mortgage company, and for their benefit. How can that company accept the benefit of his acts as their agent, and escape the result of a fraud perpetrated in that act? The contract, as a whole, in such a case, must stand or fall. We can readily see that a difference might arise in a case where the mortgage company, on its own behalf and for a separate consideration, procures a policy of insurance for its own benefit, unaffected by any act or concealment on the part of the owner of the property. But where such owner, on his own behalf, and as agent for the mortgagee, obtains and pays for the insurance, and in the very act makes a fraudulent concealment of a material fact, which the policy on its face provides shall prevent the policy from ever becoming valid, the mortgagee, however innocent, cannot, by accepting the policy, evade the effect of the fraudulent act. *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. 713; *Centennial Mut. Life Ass'n v. Parham*, 80 Tex. 518, 16 S. W. 316; *Fire Ass'n of Philadelphia v. Flournoy*, 84 Tex. 632, 19 S. W. 793. See, also, *Swenson v. Sun Fire Office*, 68 Tex. 461, 5 S. W. 60; *Henderson v. Railway Co.*, 17 Tex. 572."

See, also, *Graham v. Insurance Co.*, 87 N. Y. 69, 11 Ins. Law J. 69; *Davis v. Insurance Co.*, 135 Mass. 251.

³⁵ *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191.

§ 125. When the Insurer will be Entitled to Collect from the Carrier.

When a carrier is liable to a consignee or owner for goods lost while in transit or in its custody, on payment of a loss by the insurer the latter will be subrogated to the rights of the owner to recover from the carrier.³⁶ This proposition is based upon the principle that the liability of the carrier is primary, and that of the insurer secondary; not in the order of time, but in respect to ultimate liability. The owner of the property lost may look to either party to be reimbursed for the damage he has sustained. If he elects to hold the carrier, the insurer will be excused, as the owner will not be entitled to two satisfactions for one claim. When the carrier has provided in its bill of lading that it shall not be liable on account of loss by fire, it will be relieved, unless it appears that the fire was the result of the carrier's own negligence.³⁷ When there is a consideration for the exemption, as the offer of a reduced rate or the promise of a superior service, the courts will allow carriers to contract in such a manner as to limit their liability in respect to certain of the ordinary or even extraordinary accidents incident to their business, but, on grounds of public policy, carriers will not be permitted to interpose contract stipulations to protect themselves from the consequences of their own wrongdoing. It is competent for carriers to stipulate in their contracts with shippers for the benefit of any insurance which shippers may obtain on property consigned. When this is done, the insurer will not be entitled to subrogation on payment of a loss.³⁸

³⁶ *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 643, 19 Ins. Law J. 695.

³⁷ *Grace v. Adams*, 100 Mass. 505; *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815; *Id.*, 66 N. W. 132.

³⁸ *Mercantile Mut. Ins. Co. v. Calchs*, 20 N. Y. 173; *Rintoul v. Railroad Co.*, 20 Fed. 313; *British & F. Ins. Co. v. Gulf, C. & S. F. R. Co.*, 63 Tex. 475, 14 Ins. Law J. 776; *Providence Washington Ins. Co. v. The Sidney*, 23 Fed. 88; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176, and 15 Ins. Law J. 574; *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.* (Minn.) 66 N. W. 132.

§ 126. When by Subrogation the Insurer will Have a Right of Action against Those through Whose Negligence the Loss has been Occasioned.

When insured property has been destroyed by the wrongful act of another, and the loss is paid by the underwriter, the right of subrogation is now so well settled and so generally understood that it will need hardly to be stated. The use of steam power as a motor has largely increased the perils of fire. The transportation of passengers and freight by rail has multiplied the dangers of conflagrations. The train must run on its appointed time, irrespective of conditions that may increase or diminish the security of exposed property. Unusual dryness or exceptionally strong winds will not excuse the railroad company from carrying the mails, or from delivering passengers and freight at their proper destination, on scheduled time. The convenience of the public and the exigencies of business require prompt and faithful performance on the part of the carrier. But, while this is true, the railroad company, as well as all others, must so use its own as to do no harm to the rights and property of others. This is based on the principle expressed in the maxim, "*Sic utere tuo, ut alienum non laedas.*"

Cooley in his work on Torts,³⁹ in discussing the liability arising from negligence, says: "Fire being a dangerous element, a degree of care is required in making use of it corresponding to the danger. It may be employed lawfully for all the purposes of life, for what is useful, and also for amusement upon one's own premises, subject, only, to the conditions of due care; but due care is a degree of care corresponding to the danger, and requires circumspection not only as to the time and place of starting, but in protecting against its spread afterwards."

In *Hewey v. Nourse*,⁴⁰ the court said of one who builds a fire: "He must use reasonable care and prudence to prevent its spreading and doing injury to the property of others. The time of building may be suitable, and the manner prudent, and yet, if he be guilty of negligence in taking care of it, and it spreads, and does injury to

³⁹ Page 589.

⁴⁰ 54 Me. 256.

the property of others in consequence, he is liable for any damage for the injury done."

These declarations correctly express the common-law liability of the wrong-doer. The liability of railroad companies and others in some of the states is regulated by statute; elsewhere, reliance is had on the common law. We find some very old English authorities defining the law on this subject as early as the fifteenth century. Rolle, in his *Abridgment of Action on the Case*, says: "If any fire burns the goods of another man, he shall have his action on the case against him. If a fire breaks out accidentally in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So, if the fire is caused by a servant or a guest, or by any person who enters the house with my consent; but otherwise if it is caused by a stranger who enters the house against my will."

So, also, in *Beaulieu v. Finglam*,⁴¹ where it is declared: "A man is held to answer for the deed of his servant, or of one of his household in such case; for if my servant or one of my family puts a candle on a bracket, and the candle falls in straw, and burns up my house and the house of my neighbor, also in such case I shall answer to my neighbor for the damage he has received."

Before the American Revolution, we find that the English parliament had undertaken to change by statute the liability of persons through whose negligence fires were caused. The first legislation we find on this subject is 6 Anne.⁴² This was enacted in 1707, and provided that "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin."

The supreme court of Wisconsin, in *Spaulding v. Chicago & N. W. Ry. Co.*,⁴³ expresses a doubt whether these statutes were a part of the common law of this country, and intimates that, while it will govern in a large majority of cases, it should not be regarded as having the force of law, and that, in its application, there will be found a large number of exceptions; that the statute was enacted just prior to the Revolution, when the sentiment of respect for English laws and English institutions throughout the colonies, for obvious reasons, was

⁴¹ 2 Hen. IV. Y. B. fol. 18, pl. 6; *Althorpe v. Wolfe*, 22 N. Y. 366.

⁴² Chapter 3, § 6.

⁴³ 30 Wis. 116.

weak. It is suggested, too, that the circumstances in this country were so different from those in England as to render a law of this character unsuitable to the wants and interests of the people. But, irrespective of the question of how much force this statute was entitled to be given as the law of the land, the court said: "It would need no argument to show that railroad companies' engines, moving at the greatest velocity, and conveying their fire through the length and breadth of the land, and which, with the utmost precautions for the safety and protection of property, and with the application of great care imposed upon their managers, are still very dangerous, were not within the contemplation of the framers of the statute. No such machinery was then known, nor was it invented or thus put to use for more than half a century after the act was passed. It would seem, therefore, a great stretch of construction to apply the statute to such a case."

In 1774, parliament again enacted a law relating to fires.⁴⁴ It reads: "No action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other buildings, or on whose estate any fire shall, after the 24th of June, accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby."

§ 127. Negligence the Basis of Liability.

It will be observed that both of these statutes relate wholly to buildings; that persons are exempt from liability on account of the burning of other and contiguous property only when the fire is accidentally kindled in his house, chamber, stable, barn, or other building. Blackstone says that the word "accidental" in the first of these statutes was construed to mean "negligent"; that is, not willful or criminal. Thus modified, we find the principle of these statutes applied substantially in all of the United States where the common law prevails. No person can be held for damages on account of a fire which may have originated in his house, barn, or other buildings, such fire being accidentally or even negligently caused, unless such negligence is so gross as to raise a presumption of fraud and

⁴⁴ 14 Geo. III. c. 78, § 86.

criminal intent. These statutes, it will be seen, mark the limit beyond which a person will be liable for his negligent act. When one kindles a fire in a public street, or in his field, he must exercise care to keep it within control, or, failing to do so, must make good the damage which results. Negligence will in all cases be the test of liability.⁴⁵ The farmer burning his brush and stumps and the railroad company operating its trains are subject to the same rule of law. Both must act with prudence and due regard to the rights and security of others.

In the case of *Fahn v. Reichart* ⁴⁶ the defendant had set fire to logs and brush on his own land, and sparks were carried by the wind to the farm of the plaintiff, burning his barn. The court held: "If the defendant was not guilty of negligence in the care and management of the fire set by him, he would not be liable." Negligence is the gist of the action. The authorities in support of this proposition are uniform and numerous.

A careful examination of the authorities discloses the fact that in a large proportion of the cases which the courts have been called upon to consider, where recovery was claimed on account of the burning of property by the wrong-doing of another, the use of steam power has been the active cause, and a railroad company the party complained of. This arises, obviously, from the circumstances and magnitude of the business in which this class of carriers is engaged. In some of the states legislation has been had that relieves the person seeking to recover from a railroad company from the burden of proving negligence.⁴⁷ It is only necessary to show that the defendant railway company caused the burning of the property, and negligence will be presumed. The burden is thrown upon the accused party of showing that its engine was properly equipped, and that it was operated with prudence and skill, and otherwise was not in fault. Elsewhere, negligence must be pleaded and proven by the party seeking to recover. What constitutes negligence is a question for the

⁴⁵ *Missouri Pac. R. Co. v. Cullers*, 17 S. W. 19, 81 Tex. 382.

⁴⁶ 8 Wis. 255.

⁴⁷ In Missouri and Iowa, and perhaps other states, it is not required to show negligence, in order to charge railroad companies with loss which has been caused by their agents and servants. *Mathews v. Railroad Co.*, 121 Mo. 298, 24 S. W. 591.

jury under instructions, and is often a matter of much difficulty. While extraordinary care will not be required on the part of the railroad company, it must neglect no reasonable precaution to prevent the setting of fires. Its engines must have the best well-known modern appliances for arresting sparks, and these must be kept in good repair. Its engines, too, must be managed with prudence and skill. Beyond this nothing can be required.

Judge Dillon, in deciding the case of *Kellogg v. Milwaukee & St. P. R. Co.*,⁴⁸ said: "The best test you can bring to bear is, what would an ordinarily prudent and careful man have done under the precise circumstances here presented to you?"

The supreme court of Wisconsin, in *Read v. Morse*,⁴⁹ said: "The utmost care which the law can impose upon the defendant relates only to the use of all reasonable and proper means to avoid damage, and does not extend to all possible precautions against injury."

§ 128. Burden of Showing Negligence will Generally Rest on the Plaintiff.

On this question of negligence, Cooley states his understanding of the law as follows: "There must be some evidence which will warrant imputing the injury to the negligence or misconduct of the defendant, or his servants, and the burden is upon the plaintiff to make this showing. The plaintiff makes out this part of his case by showing that the fire was kindled when and where it would be likely to spread as it did, or pass beyond control, or that it was left without proper care afterwards. * * * It is immaterial whether the fire spreads by running along the ground or by sparks or brands being carried through the air by the wind." *

§ 129. What is the Proximate Cause.

It will often occur that the property burned, for which damage is claimed, is remote from the place where the fire was first kindled. The conflagration, once started, may advance from building to building, or sparks may be carried by the wind until the property which

⁴⁸ 5 Dill. 542, Fed. Cas. No. 7,664.

⁴⁹ 34 Wis. 318.

* Page 701.

is the subject of contention is reached, at a long distance from the place where the fire was tortiously set. In a case of this kind, the question to be considered is, has there been an independent and intervening cause? If not, the primary fire will be regarded as the proximate cause of the burning of the property in dispute.

*Atkinson v. Goodrich Transp. Co.*⁵⁰ is a leading authority on this point. The defendant in that case, it was alleged, negligently set fire to a planing mill situated on the banks of the Fox river, at Green Bay, Wis. The fire spread to other buildings across the street, and thence to others more remote, and from the latter was carried by the wind for more than a quarter of a mile to the house of the plaintiff, which was destroyed. The Wisconsin court, in its opinion, reasserted the rule for distinguishing between the proximate and remote cause, applied by the supreme court of the United States in the case of *Milwaukee & St. P. Ry. Co. v. Kellogg*,⁵¹ and quoted from the opinion in that case as follows: "The true rule is that what is the proximate cause of the injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of all the circumstances of fact attending it. The primary cause may be the proximate cause of the disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by the force applied at the other end, that force being the proximate cause of the movement, or as in the oft-cited case of a squib thrown in the market place.⁵² The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some other and independent cause intervening between the wrong and the injury? * * * It must appear that the injury was the natural and probable consequence of the negligence of the wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

The proximate cause is not the one which is nearest in time to the result, unless such cause be independent. That must be regarded

⁵⁰ 60 Wis. 141, 18 N. W. 764.

⁵¹ 94 U. S. 469.

⁵² *Scott v. Shepherd*, 2 W. Bl. 892.

as proximate which is primary, efficient,—the one which is the cause of causes. That which is only incidental and contributing is in no sense responsible for the disaster, and it is with this understanding that we must apply the maxim, "*Causa proxima non remota spectatur.*" In considering the question of negligence, on which liability will generally depend, a careful regard must be had to attending circumstances. To make plain this proposition, let us suppose that a railroad engine sets fire to the prairie grass. A mile distant, and across a plowed field, are farm buildings and stacks of grain. At the time the grass is kindled, the wind is light, and blowing from the direction of the buildings mentioned. Subsequently its course is changed, and the velocity increased to a gale. The fire is carried across the plowed field, and the property burned. Under the circumstances here supposed, was it negligent for the servant of the railroad company to so operate its engine as to permit fire to escape and kindle the dry grass? Could he, as a prudent and intelligent person, in view of the facts mentioned, have reasonably anticipated and foreseen that the fire thus set would have caused the injury? We think such a conclusion would be unwarranted, and that the case is wanting in the element of negligence which makes the railroad company a tort-feasor, and liable for the damage sustained.

There is another important question involved in this hypothetical case. When the fire was first started, the wind, it will be remembered, was light, and blowing from the buildings towards the railroad track. Afterwards its direction was changed, and velocity greatly increased. Was this an independent cause? We think it was. It may be suggested that the change in the course and velocity of the wind was only contributing and auxiliary to the disaster. While it is true that the wind, of itself, would not have caused the loss, neither would the fire, without the agency of the wind. After the grass had first been ignited, the conditions had been changed in such important respects as to create another independent and, in a qualified sense, intervening cause. At the inception of the fire the efficient force was absent. It came later with the wind. The primary cause was an innocent one. There was no continuous chain connecting it with the stacks of grain and farm buildings. There was, it is true, the materials from which a chain could be constructed, but these existed in fragmentary form. There may even have been

dissevered parts, but additional links were required to unite these parts into one continuous whole.

§ 130. Contributory Negligence.

Where the plaintiff has contributed to the loss by his own negligence, he cannot recover. This question will sometimes arise under circumstances so complicated as to occasion courts great difficulty in determining the rights of litigants. The interests of manufacturing and commerce are those of the general public, and in promoting these interests the manufacturer and the carrier will be protected within reasonable limitations. In the prosecution of their business, the extensive use of fire is indispensable, and, while recognized as useful, it is also understood to be a dangerous agent, and its use must be attended with reasonable care. Still, to impose such stringent restrictions upon its employment as to materially impair its usefulness and embarrass business, would be unwise, and opposed to a sound public policy. In the fostering of these enterprises, in which the well-being of society is so directly concerned, the courts properly show a protective interest, and when loss results, where the suffering party has been guilty of contributory negligence, no damage will be adjudged. Persons owning property situated contiguous to railways and manufacturing establishments must exercise a due degree of care in its protection, and, failing to do so, they will be without a remedy, should they sustain loss. The fact, however, that a person builds his house or shop near the railroad track will not excuse negligence on the part of the railroad company. The exposed position may even call for increased care by both parties; but, should the owner of the property thus situated invite disaster by his own imprudence, he will do so at his peril. Should a building so located be filled with inflammable material, and the windows allowed to remain open on the exposed side, or if shavings, litter, or other highly combustible matter be allowed to accumulate about the premises during periods of unusual dryness, and a loss occur under such circumstances, it will be the duty of the court to refuse damages, on the ground of contributory negligence.

In the case of *Cook v. Champlain Transp. Co.*⁵³ the court said:

⁵³ 1 Denio (N. Y.) 91.

"The landowner builds immediately on the line of the railroad, as he has the unquestioned right to do. It may be an act of great imprudence, but in no sense is it illegal. Is he remediless, if his house is set on fire by the sheer negligence of an engineer in conducting his engine over the railroad? There must be some wrongful act or culpable negligence on the part of the plaintiff to bar him on this principle, and neither can be affirmed of any one for simply occupying a position of more or less danger on his own premises. * * * We must, I think, come to the conclusion that, while the person confines himself to a lawful employment on his own premises, his position, however dangerous or imprudent it may be, is not, therefore, wrongful, and his undue care or judgment in its selection can never amount to negligence, so as to deprive him of redress for wrongs done him by others."

§ 131. As to Who is Primarily Liable.

The supreme court of the United States, in the case of *Chicago, St. L. & N. O. R. Co. v. Pullman South Car Co.*⁵⁴ discusses the question presented, when two or more parties are liable for a loss, with which of the parties the liability primarily rests. The Pullman Car Company had agreed to furnish parlor and sleeping cars for the plaintiff's road during a term of years, the latter assuming by contract stipulations to make good any loss or damage by accident or casualty which might result to the cars, except such as might be caused by any defect in the lighting or heating apparatus. One of the cars thus engaged, from unknown cause, and without fault of the railroad company, was destroyed by fire. The Pullman Car Company held policies of insurance on the property, and under these policies a loss had been recognized by the insurers, adjusted, and paid. Subsequently, by arrangements between the insurers and the Pullman Company, suit was brought by the latter against the railway company to recover the whole loss sustained. No wrong was imputed to the railway company in connection with the cause of the fire. Its liability, if any, was created entirely by the terms of the contract into which it had entered with the Pullman Company, and

⁵⁴ 139 U. S. 79. 11 Sup. Ct. 490.

the court held that the insurers were entitled to the benefits of the contract between the railroad and the Pullman Company. We quote from the opinion by Harlan, J.: "The plaintiff could recover only one satisfaction for the loss, and if the amount recovered from the railroad company, increased by the sum collected from the insurance companies, was more than sufficient for its indemnity, the excess would be held in trust for the insurance companies. The inquiry in this action is as to the amount for which the railroad company is bound, on its contract with the plaintiff, and the recovery is not affected or limited by the amount collected from the insurance companies. As said in *Mobile & M. R. Co. v. Jurey*,⁵⁵ which was a suit against a carrier, 'although the suit is brought for the use of the insurer and it is the sole party beneficially interested; yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond to all the damages sustained by the breach of his contract. If one part of the loss has been paid by the insurer, the insured is entitled to the residue.' This is because, as said by Chief Justice Shaw, in *Hart v. Western R. Corp.*,⁵⁶ 'the liability of the railroad is, in legal effect, first and principal, and that of the insurer secondary,—not in the order of time, but in order of ultimate liability.' So, in *Weber v. Morris & E. R. Co.*:⁵⁷ 'Notwithstanding such payment, an action will lie by the insured against the railroad company. The insurance is to be treated as a mere indemnity, and the insured and the insurer regarded as one person.' So, also, as to when the right of subrogation exists and the manner of its enforcement, in the opinion of Justice Gray, in *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*"⁵⁸

§ 132. Conclusions.

When the mortgagee procures the insurance at his own charge, the mortgagor may claim nothing in the settlement of a loss. He is not a party to the contract, and in no way beneficially affected.

⁵⁵ 111 U. S. 584, 4 Sup. Ct. 566; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 321, 6 Sup. Ct. 750, 1176.

⁵⁶ 13 Metc. (Mass.) 99.

⁵⁷ 35 N. J. Law, 409.

⁵⁸ 139 U. S. 223, 11 Sup. Ct. 554.

When, in such case, the insurer pays the mortgagee the full sum due him under the terms of the mortgage, then he will be entitled to an assignment of the securities, for the protection of which the policy was issued.

As the mortgagee has no insurable interest in the property covered by the policy; except in the preservation of his security, the extent of the insurer's obligation will be the restoration of the property, or the payment of the sum due on the mortgage.

It is contrary to public policy and destructive of public virtue to permit the insurance of property for the benefit of persons who have no insurable interest. It is equally opposed to public policy and public virtue for a person to be twice satisfied for one debt, to have two payments of one loss, or otherwise to be benefited by the wrongs and misfortunes of others. As, therefore, the mortgagor is not privy to the contract between the insurer and mortgagee, he has no rights to be enforced, and his obligations as debtor will continue unimpaired; and, as the law will not permit two payments to the mortgagee, when he is made whole the duty of the insurer has been performed, and he may go hence, taking with him whatever may remain of the mortgage debt.

It is competent for carriers to relieve themselves, by contract, from loss to property for which they become liable in the course of business, except such loss as shall result through their own negligence and wrong-doing, or the negligence and wrong-doing of their servants.

Carriers may agree with shippers for the benefit of insurance they may have, or thereafter obtain, on merchandise received from such shippers for transportation. When this is done, the right of subrogation will not exist to the insurer, who pays loss on affreightment.

Every person must use his own in such manner as not to deprive others of the natural and lawful enjoyment of their own. This rule expresses the compromise between the spirit of order and justice on one side and aggression and robbery on the other. To its recognition and enforcement we shall owe the permanence of human society. "*Sic utere tuo, ut alienum non lædas.*" When the insured property is destroyed by the wrongful act of another, on payment of the loss, the insurer will be subrogated of the insured's right to recover from the wrong-doer.

Negligence or a wanton destruction of property is, in most cases, the basis of subrogation, except in states where the rule of the common law is changed by statute.

When separate insurance is procured by both the owner of the property and the mortgagee, independent and distinct interests are covered, and there will be no forfeitures on account of other insurance "without notice," nor will one policy be entitled to contribution from the other in payment of a loss.

The respective rights of the insurer, mortgagor, and mortgagee must be determined by the terms of the contract which brings them into relationship. Each will owe to the other the performance of such duty only as the contract expresses. When the mortgagor obtains the insurance, the loss will be payable to him, unless it be otherwise designated in the policy.

When the mortgagor obtains insurance at the request and charge, and for the benefit, of the mortgagee, the former becomes the agent of the latter in respect to this particular act, and any concealment, misrepresentation, or other fraud practiced by the mortgagor in procuring such insurance is chargeable to his principal, the mortgagee. "*Qui facit per alium, facit per se.*" In such case the stipulation in the mortgage clause, relieving the mortgagee from forfeitures under the terms of the policy, caused by "the acts and omissions" of the owner, of the property, does not apply. The acts and omissions are those of the mortgagee, from the consequences of which he is not relieved by the stipulation.

CHAPTER VII.

WARRANTIES AND REPRESENTATIONS.

- § 133. Warranties must be Performed unless Performance is Waived.
- 134. Distinction between Warranties and Representations.
- 135. What is Performance, and What is Not.
- 136. May the Written Evidence of Warranty be Set Aside by the Parol Testimony of an Interested Witness?
- 137. Is it within the Province of the Court to Annul a Promissory Warranty because such Warranty Contemplates Changes in the Circumstances of the Risk?
- 138. The Right of Persons to Make Contracts Concerning All Subjects Affecting the Ordinary Affairs of Life is a Constitutional One, and Cannot be Taken Away, by Construction or Otherwise.
- 139. Warranties and Conditions Precedent Essentially Alike.
- 140. Warranty Concerning the Quantity of Land Comprising the Premises Insured.
- 141. When Warranties are in Præsenti, and When Continuing.
- 142. Conclusions.

§ 133. Warranties must be Performed unless Performance is Waived.

The warranty expressed in an insurance contract must be substantially true, whether the fact warranted is material or not. The courts have held without exception that the question of materiality has been settled by the agreement of parties, and cannot be inquired into after a loss. The rule is different in respect to representations. It is on the materiality of these, and not their literal truth, that an obligation rests.¹

¹ Virginia Fire & Marine Ins. Co. v. Morgan, 90 Va. 290, 18 S. E. 191 (see authorities there cited); Home Ins. Co. of New York v. Delta Bank, 71 Miss. 608, 15 South. 932; Mechanics' Ins. Co. v. Thompson, 57 Ark. 279, 21 S. W. 468; Hanover Fire Ins. Co. v. Gustin, 40 Neb. 828, 59 N. W. 375.

In the last case cited, it was held that there must be substantial, if not literal, compliance, when the terms of the warranty are definite, and that when ambiguity exists the construction must be reasonable, and consistent with common usage.

§ 134. Distinction between Warranties and Representations.

To distinguish between a warranty and a representation often calls into exercise our best faculties of discrimination, and it not unfrequently occurs that the courts are baffled in their most patient efforts to ascertain the real intention of the parties. The facts involved sometimes present this question clouded with so much obscurity that no clear line of distinction can be found, even by minds accustomed to dealing with abstruse and perplexing problems. When the circumstances are of this character, it will be the duty of the court to resolve its doubt most favorably to the insured, who, it may fairly be presumed, is the least responsible for the confusing entanglement of words which has caused to be doubtful that which could so easily have been made plain. Generally the line separating a warranty from a representation is broad, and plainly discernible to the average intelligence. The preliminary survey and the later negotiations which lead to the ultimate agreement and completed contract are usually the work of persons who are unlearned in the dialectics of the law,—persons who are without such special knowledge and technical skill concerning these important matters as to enable them to intelligently distinguish the precise legal import of particular words and phrases. These facts are recognized by the courts, and their judgments frequently indicate the desire, and sometimes the purpose, to “temper the winds to the shorn lambs.”

When the application signed by the assured is referred to in the policy, and declared to be a warranty, it will be so held;² but even then distinctions have been made between such parts of the application as are merely descriptive, which are necessary only to locate

² When application is referred to in the policy, signed by the insured, and its statements warranted to be true, the parties will be bound. *Sun Fire Office v. Wich* (Colo. App.) 39 Pac. 587; *Phoenix Assur. Co. v. Coffman* (Tex. Civ. App.) 32 S. W. 810; *Denny v. Insurance Co.*, 13 Gray (Mass.) 497; *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425.

Held, that statement contained in the application, designated a “warranty,” being inconsistent with other statements in application, could have no greater legal effect than representations. *Indiana Farmers’ Live-Stock Ins. Co. v. Byrket* (Ind. App.) 36 N. E. 779.

and define the risk, but have no importance as to an understanding of its character, and cannot be presumed to have influenced the insurer in fixing the rate, or its acceptance of the hazard, and other parts where the statements made are clearly material, relating to matters affecting either the physical or moral features of the risk proposed. The former are usually called "representations," and the latter "warranties." A warranty cannot be created by construction. It has such rigor in its character, and such dominating influence in the construction and enforcement of a contract, that it can never be called into existence except by the agreement of parties, either expressed or clearly implied.

In *Daniels v. Hudson River Fire Ins. Co.*,³ the question of what constituted a warranty was a subject of contention. Shaw, C. J., said, "There is undoubtedly some difficulty in determining by any simple and certain test what proposition in a contract of insurance constitutes a warranty, and what a representation."

It appears that the intention of the parties must be the ultimate test. This can frequently be ascertained from the circumstances presented. If the statement or proposition made has no important relation to the undertaking, it ought not to be presumed that the insured intended, or that the insurer understood, that it was to have the dignity and importance of a warranty. Chief Justice Shaw gives a very satisfactory illustration of this principle of interpretation. Referring to the application, he says, "The declaration was 'ashes are taken up in iron hods.'" It was admitted that the hods were made of copper, and not of iron. He adds: "If this was a warranty, the policy is gone. If a representation, it would not, we presume, affect the policy, because it would be utterly immaterial, and would not have influenced the minds of either party in making the contract or fixing its terms. Hence it is that the leaning of all courts is to hold such a stipulation to be a representation, rather than a warranty, in all cases where there is any room for construction, because such construction will in general but carry into effect the real intent and purpose which the parties had in view in making the contract."

The learned and eminent judge reasoned with much plausibility that it was the intention of the insurer to warrant a "metal hod," and

³ 12 Cush. (Mass.) 416.

that the kind of metal was not material, and presumably not in the minds of the parties to the contract. This conclusion, it appears to us, involves a fallacy, which on being pointed out indicates the danger that will always exist when the court stops to consider the question of materiality in connection with a warranty. The application, which was made a part of the policy and a warranty, said that "the ashes were taken up in an iron hod." Now, suppose, for purpose of illustration, that the hod actually in use was made of lead,—a metal that will fuse at a comparatively low temperature. Would the learned judge have been justified in holding, as a matter of law, that it was immaterial, and that the fact had not influenced the minds of the parties when entering into the undertaking? But if the use of a lead hod would have been a breach of warranty, because it is a metal that liquefies at a lower temperature than iron, then for the same reason would the use of a copper hod, for a greater heat is required to melt iron than copper. The difficulty and confusion result from the abandonment of the distinctive and elemental character of a warranty, and degrading it to the level of a representation, by permitting an inquiry to be made into the materiality of the thing or fact warranted.

The Pennsylvania court, in deciding the case of *State Mut. Fire Ins. Co. v. Arthur*,⁴ presents the following brief yet lucid explanation of the nature and object of a warranty. It said: "The purpose in requiring a warranty is to dispense with inquiry, and cast entirely upon the assured the obligation that the facts shall be as represented. Compliance with his warranty is a condition precedent to any recovery upon the contract. It is therefore that the materiality of the thing warranted to the risk is of no consequence."⁵

In the case of *Chrisman v. State Ins. Co.*⁶ an application was taken on a printed form. Certain questions were asked and answered, and

⁴ 30 Pa. St. 315.

⁵ *Newcastle Fire Ins. Co. v. Macmorran*, 3 Dow. 255; *Burritt v. Insurance Co.*, 5 Hill (N. Y.) 188; *Wilson v. Insurance Co.*, 6 N. Y. 53; *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.) 415.

Materiality of warranty a matter of law. *Patten v. Insurance Co.*, 38 N. H. 338; *Hutchins v. Insurance Co.*, 11 Ohio St. 477; *Shoemaker v. Insurance Co.*, 60 Barb. (N. Y.) 84; *O'Neill v. Insurance Co.*, 30 U. C. C. P. 151.

⁶ 16 Or. 283, 18 Pac. 466.

there were other questions to which no answers were given. The policy referred to this application, and made it a warranty, in the following terms: "The basis of the contract is said application, which shall be taken and deemed as a part of this policy and a warranty on the part of assured, and any fact or untrue answer and statements material to the hazard of the risk shall render this policy null and void." The trial court instructed the jury that the statements contained in the application must be true "so far as they were material to the hazard, and that the materiality of such statements must be shown by evidence." The supreme court, to which the case went on appeal, held to a different opinion. It said: "This contract must be so construed as that every word and part thereof shall have effect if possible. This is an elementary rule, to be applied to all writings whenever any right is claimed under them in a court of justice. But, in giving and refusing the charges excepted to, the court below overlooked one essential part of the contract. It is contained in the application and is quoted above. The effect of the material part of it is that if the applicant does not truly answer the following interrogatories, and correctly describe, state, and make known the property, the value, the title, the location, the exposures, the occupancy, the liens and incumbrances thereon, or if any misrepresentations or omissions to make known any and all facts material to the risk herein, then the said policy shall in either event be null and void. Here the assured was required to make known certain enumerated facts, concerning which he was particularly questioned, and then he was required to make known all facts material to the risk therein, and a failure in either event rendered the policy void. The instruction given by the court was not in accordance with this construction of the policy, and was therefore erroneous; and so, too, as to the instruction refused by the court. The effect of that refusal, and the giving of the instruction complained of, was to declare that said policy contained no warranty; that all the statements of the assured in his application were representations merely, and not warranties, and their falsity was of no effect unless material to the hazard of the risk. In this view, the distinction between a warranty and a representation was entirely overlooked. The difference between a warranty and a representation is that a warranty must be true, while a representation must be true only so far as the representation is

material to the risk; and it is material when a knowledge of the truth would have induced the insurer to have refused the risk, or to have charged a higher rate of premium."

It will be observed that the court here takes the position that, an application having been made a part of the policy, not only the facts stated therein became warranties, but, under the terms of that part of the application quoted, the insured warranted to disclose all facts in regard to the situation, character, and occupancy of the property,—in fact, the disclosures promised and warranted related to all matters inquired about, and besides to all other matters material to the risk; that the printing in the application of a question signified the asking of such a question, which must be answered; and that if no answer was given the omission constituted a breach of the warranty. We think this is carrying the doctrine further than will be justified, in view of the general trend of authorities. The courts have often held—and, we think, generally—that when a printed question is presented in an application, and the blank in which answer is to be made is left unfilled, such question will be deemed not to have been asked, or that the answer has been waived.⁷ The covenant, however, in this application, differs in important particulars from those usually found in applications for insurance. The court, too, it will be observed, says that the application and the policy become an entirety; that, by force of the agreement expressed on the face of the policy, the two writings are merged into one contract; and that they must be construed together, as far as possible, and in such a manner as to give effect to each word and provision. But the courts have been in the habit of construing the insurance contract, when it is ambiguous, or when difficulty is experienced in reconciling apparently contradictory provisions, so as to give to the assured the benefit of any doubt which may be found to exist, on the ground that it is the language of the company, and not of the insured, and that it was the

⁷ *Wyman v. Insurance Co.*, 1 Allen (Mass.) 301; *Campbell v. Insurance Co.*, 73 Wis. 100, 40 N. W. 661; *Butler v. Insurance Co.*, 4 Tupper (Can.) 391; *Gill v. Insurance Co.*, 1 Ont. 341; *Dohn v. Insurance Co.*, 5 Lans. (N. Y.) 275; *Buell v. Insurance Co.*, 2 Flip. 9, Fed. Cas. No. 2,104, and 5 Ins. Law J. 274; *Pavey v. Insurance Co.*, 56 Wis. 221, 13 N. W. 925; *Dodge Co. Mut. Ins. Co. v. Rogers*, 12 Wis. 337; *Geib v. Insurance Co.*, 1 Dill. 443, Fed. Cas. No. 5,298; *Kansas Protective Union v. Gardner*, 41 Kan. 397, 21 Pac. 233.

insurer's duty to make the contract plain and free from ambiguities or contradictions. The rule appears to be invariable that when construction becomes necessary it will be more strictly against the insurer than the insured. Now, the provision of the policy by which it is claimed that this application was incorporated provided, among other things, as the lower court interpreted it, and as we think it should be interpreted, that the answers should be warranted so far as they were material to the hazard. Adopting, therefore, the usual rules of construction, it is not clear, we think, that the trial court committed any error in holding that the matter of materiality must be shown by evidence. But, as we have seen, the supreme court disputed this view of the matter, and notwithstanding the clause referred to, in regard to materiality, it was held that the application, with each statement it contained, under the agreement expressed on the face of the policy, became a warranty, and, if not literally true in each and every particular, there would be no liability on the part of the insurance company to pay the loss. But the court does not stop here. The warranty is extended to embrace printed questions, and the omission to answer these, it is held, would be such a breach as to cause a forfeiture.

Where an application is made the basis of the insurance, and referred to in the policy as containing statements and representations that are to explain and constitute a part of the agreement, the contract will be understood as existing in two parts, which must be construed together. The application will generally set out with particularity, and in definite form, such facts and circumstances as the insurer deems important and material for an understanding of the hazard; and it is uniformly stipulated in such cases that its obligation to pay a loss is made to depend upon the truthfulness and good faith of the statements contained in the application. The signing of an application by the insured, or the manner of its identification, is not essential. Proof in both these respects can be supplied by parol.

In *Rankin v. Amazon Ins. Co.*⁸ the policy expressed the following stipulation: "Reference is hereby made to a survey and diagram on file in the office of J. C. Mitchell & Son, which is made part of this policy, and a warranty on the part of the assured." In fact, there was

⁸ (Cal.) 25 Pac. 260.

no application on file in the office of J. C. Mitchell & Son at the time the policy was issued, nor for a period of two weeks afterwards. Mitchell & Son were the brokers who negotiated the insurance, and Mr. Mitchell's undisputed testimony was to the effect that when he procured the insurance he promised to obtain survey and application, and retain the same on file in his office, for the benefit of the parties interested. The application thus procured does not appear to have been regularly signed by the insured, and, besides, it was written on a blank prepared for the use of another company; and we are left to infer from the statement of facts contained in the report of the case that there was nothing in the survey and application itself to show conclusively that it was the one referred to in the policy, and nothing to indicate that such was the fact, except that it described the particular property insured. The court held that this was not important, and permitted the defendant, by parol evidence, to identify the survey and application. The court said: "Mitchell testifies that when he procured the policy he promised to procure and furnish such an application and survey, and that he did procure and furnish this one in compliance with that promise; and it is uncontradicted that he did so, and that this was the only one furnished. The contract was to be in two parts, as all these contracts are,—each dependent upon the other. One of the parts was finished at one time, and in this instance either the other was finished at another time, or has never been finished. If finished, they constitute one contract. If never finished, there was never any contract. This paper, which was furnished by the agent of the insurer in pursuance of his promise, answers the calls of the other part of the contract, is in the form of an application and survey, accompanied by a diagram illustrating the survey, and furnishes the ordinary information upon the insurer's part on which such a contract is based."

The rule of law as to whether a court may inquire into the materiality of a warranty was clearly and forcibly stated by the supreme court of Maine in the case of *Johnson v. Maine & N. B. Ins. Co.*⁹ The insurance there was on the life of one Smith, and was based on certain statements contained in the application, which were agreed to be material and warranties. To one of the questions asked in the

⁹ (Me.) 22 Atl. 107.

application it had been answered that neither of the insured's parents or brothers and sisters had been affected with insanity. This, on the trial of the case, was found to be untrue, and the plaintiff sought to relieve a forfeiture by showing that it was not material. The court said: "This contract was evidenced by two written instruments,—one called the 'application,' signed by Smith; the other called the 'policy,' signed by the proper officers of the company. All the terms and conditions of the contract were embraced in these two writings." To save an avoidance, while plaintiff admitted that the applicant for insurance did know that he had a half-brother of an unsound mind, afflicted with a mild form of what is designated in medical science as "dementia," he had given the answer contained in the application in good faith, not understanding that his brother's mental disease was of a character known either to the law or to science as insanity. To this plea the court answered: "If the applicant was sincere in such a belief, it would acquit him of fraud in so answering, but his sincerity is not enough to uphold a contract stipulated to be based upon the actual correctness of his answers. He stipulated absolutely in his application that his answer was 'full, complete, and true.' Such a stipulation calls for truth in fact, not merely for the applicant's knowledge and belief. His answer was unqualified. It purported to state an absolute fact. He did not qualify it by any reference to belief or understanding. The other party was to rely upon the language used,—the outward expression,—without inquiring into the inward belief. Had he stated his answer to be merely according to his belief, and such answer had been accepted, his belief might be material and sufficient, as in *Insurance Co. v. Gridley*,¹⁰ cited by plaintiff's counsel; but, as the answer stands in this case, the applicant's belief and sincerity are clearly immaterial and insufficient."

In respect to the question of whether the fact warranted was material or not, the court further says: "We do not think, however, the question of materiality of the answer is now open for consideration. That question was closed by the parties themselves. They stipulated that this answer, with all other answers, was material. The company was under no obligation to insure the life of the applicant. It was a private corporation, doing a private business. It could admit

¹⁰ 100 U. S. 614.

or reject applicants at will. It could impose such terms and conditions (not illegal) as it pleased, however immaterial or trivial they might appear to the court. It had a right to stipulate that it would not insure the life of any person whose brother had ever had any kind or degree of insanity. It had a right to stipulate that any insanity in any relative should be regarded as material to the risk. The applicant could decline to enter into a contract for insurance on those terms and conditions, or he could accept them and close the contract."

Representations will become warranties, whether designated as such or not, when, from their character, or the circumstances under which they are made, it clearly appears that it was the intention of the parties that the facts represented should be the basis of the contract; and it may often be of no consequence whether the application is referred to in the policy as a warranty, and a part thereof. If it otherwise appears that the application is the basis of the contract, all material statements which it contains will have the character and the importance of warranties. The fact that title, incumbrance, occupation of the premises, watchman, etc., are inquired about, creates a presumption that each of these matters is by the parties themselves deemed material. The applicant for insurance, and the company applied to, have a right to decide these matters in the first instance; and, as a distinguished law writer has said, "it is not competent for the courts to say they have misjudged as to the materiality of the facts." While it is the duty of courts to construe and to enforce contracts, they have no power either to create them, or to give by construction any different meaning to their terms than the parties themselves have intended. When the insured warrants to do a particular thing, it will not be performance if something else is done, which he may believe, or even know, to be as good or better. To illustrate, we will suppose that he warrants to procure and place on the premises a particular appliance for arresting fires, but, instead, another kind, of equal or even superior efficiency, is obtained. The warranty is broken, and the insurer discharged. The justice of this rule is apparent. The parties have agreed and specified what appliance will be useful and satisfactory, and it is not competent or just for either of the parties, acting independently, to substitute something different, on the plea that it is equally effective. Neither party is authorized to estimate for the other the relative value and efficiency

of the particular thing warranted and the substitute procured, nor may the courts undo what the insured and the insurer have themselves done. The question of materiality cannot be a matter of judicial inquiry. The case of *Murdock v. Chenango Co. Mut. Ins. Co.*¹¹ is quite analogous, and aptly illustrates the importance of absolute verity in stating a fact which is made a warranty. It there appeared that a stovepipe passed through a window, but it was warranted that a stone chimney would be built, and the pipe caused to enter it at the side. Afterwards the stove was removed to another part of the building, and the pipe passed through a stone placed in the roof, but no chimney was built. The company assented to the change in the location of the stove, and, through its proper officer, indorsed the policy as follows: "Consent is given that the within policy remain good, notwithstanding the stove has been removed." The court held that the warranty had not been performed, and that the policy was voided. It may often happen that the matters warranted can serve no useful purpose, but, when this occurs, performance will not be excused.

An instance of this kind is found in the case of *Johnson v. Dakota Fire & Marine Ins. Co.*¹² The application which the plaintiff signed contained certain misrepresentations in regard to title or incumbrance. The insurance was against loss from hail storms, and, as risks of that class are beyond the control of human agency, the liability of the insurer could not be increased or diminished on account of the negligence or care of the insured. There would be, from the circumstances of the case, no way in which the destructive forces of nature could be turned from their course by the will of an embarrassed and dishonest policy holder. As no bad moral hazard could by any possibility come to exist, it was, so far as the insurer was concerned, a matter of no consequence whether the property was incumbered or not, but the court said: "It certainly is not apparent to us that representations as to incumbrances, which in fire risks are conceded to be important and material, are equally so when the insurance is a hail risk. Nevertheless we must hold that the parties have a right to make a stipulation to the effect that any given representation as to a matter of fact, made as the basis for the contract, shall be deemed a warranty, and a material part of the contract. * * * It does

¹¹ 2 N. Y. 210.

¹² 1 N. D. 167, 45 N. W. 799.

not, in our opinion, matter whether the representations in the application as to the incumbrance on the property are or are not material in fact. If not intrinsically material, they have been made so by agreement of parties."

While the arbitrary insistence upon a technical right may occasionally result in hardship to one or the other of the parties to a contract, the courts have no remedial power. It is their duty to enforce the contract as made. It would, no doubt, be a greater evil to restrict the liberty of a person to agree with another in terms that he may judge best intended to promote his interests, than to give legal effect to unwise and oppressive contracts.¹³

§ 135. What is Performance, and What is Not.

Nothing less than a substantial performance of a warranty will be sufficient. It refers to the spirit as well as the letter of the contract. Even a literal observance, if it fails to accomplish the evident intent of the parties, will not satisfy. It is not form, but substance, that is warranted. This was aptly illustrated in the case of *Mechanics' Ins. Co. v. Thompson*.¹⁴ In the application, which was made a part of the policy and a warranty, it was promised that the insured would "keep within ten feet of a gin stand one barrel full of water, and two buckets." At the trial, while it was not disputed but that the barrel of water and buckets were at the place designated, it was shown that they were inaccessible, on account of cotton bales being piled in such manner as to prevent water and pails being reached without so much delay as to defeat the purpose for which they were provided. The court held—and very properly, I think—that the warranty had not been performed. It said: "The object of the second agreement or warranty is apparent. The barrel of water and two buckets were evidently required to be kept within ten feet of the gin stand for the purpose of being promptly used in extinguishing any fire that might originate in or at the gin stand. The terms of the agreement necessarily imply that the water and buckets should have been at all times.

¹³ *Stensgaard v. Insurance Co.*, 50 Minn. 429, 52 N. W. 910; *Michigan Shingle Co. v. London & Lancashire Fire Ins. Co.*, 91 Mich. 441, 51 N. W. 1111.

¹⁴ 57 Ark. 279, 21 S. W. 468; *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425.

readily accessible. Their purpose could not have been subserved in any other manner."

In *Virginia Fire & Marine Ins. Co. v. Morgan*¹⁵ there was an application, which, by incorporation into the policy, was made a warranty. The thing warranted was the keeping of certain account books in an iron safe, or other secure place. This was not done, and the court held that there could be no recovery. To prevent the forfeiture, parol contemporaneous testimony was offered to show that the insured was asked no questions in regard to books of account, that he could not read English, and that the application was not read to him before signing. The testimony so offered was refused, as it proposed an infringement of the rule that, "in the absence of fraud, parol testimony is incompetent to vary the terms of a written contract." The court referred to *Southern Mut. Ins. Co. v. Yates*,¹⁶ and, in discussing the opinion in that case, remarked: "The plaintiff, it was said, was bound, not only to answer the questions put to him correctly, but to use due diligence to see that the answers were correctly written, and that if he signed the application without reading it, or having it read to him, that of itself was inexcusable negligence. It was also said that if the evidence was admissible it would be difficult to imagine a case in which the legal import of a deed might not be varied by parol testimony. The only difference between that case and this is that here the plaintiff offered to prove his inability to read the language in which the application was filled up, but that is immaterial, as he could have easily ascertained the contents of the paper; and the law presumes, under the circumstances of the present case, that when he signed the paper he understood and assented to all it contained. If the rule were otherwise, there would be no certainty or safety in written contracts."

The correct rule is no doubt here stated by the Virginia court, but the facts to which it is applied should be carefully distinguished from those of another and a numerous class of cases, where the agent of the company, in filling up the application, fraudulently writes in different answers from those given by the insured, or where no inquiry is made concerning facts which are known to the agent, through whose fault they are incorrectly stated in the application signed by

¹⁵ 90 Va. 290, 18 S. E. 191.

¹⁶ 28 Grat. (Va.) 585.

the insured.¹⁷ When fraud is perpetrated by the company's agent, the warranty in either the application or policy will fail; and, when the company has knowledge at the inception of the risk that the facts warranted are not true, it will be estopped from pleading a breach of warranty as a defense, unless it appears that the agent and the applicant are colluding to defraud the company.¹⁸ In that case the person who fills up the application will be regarded as the agent of the one whom he collusively serves, and the insured will be bound by his warranty. The line between representations and warranties is often vague and uncertain. When this occurs the courts will resolve the doubt in favor of the insured. The righteousness of this partiality cannot be challenged, as it recognizes the fact that, in all matters preliminary and otherwise to the writing and delivery of the policy, the insurer has in most instances assumed to direct at each stage of the proceedings which lead up to the completed contract. The application and policy are both prepared in reference to forms submitted by the insurer, and these are in most instances filled up by its expert agents or employés. When, therefore, the language used is of doubtful meaning, and may be fairly understood in different ways, it will be given such construction as will be most favorable to the insured. Lord Eldon, in discussing this question, said: "It is a first principle in the law of insurance that, if there is a warranty, it is a part of the contract; that the matter is such as it is represented to be. The materiality or immateriality signifies nothing. The only question is as to the mere facts."

The distinction between a warranty and a representation consists in the fact that in one case the question of materiality is closed, and in the other it is still open. Representations often form the basis of a contract, and it is important that they be true in respect to every material fact. If untrue, and in consequence rights are injuriously affected, the contract stands on a fraudulent basis, and is without legal effect. In a warranty the materiality and value of the fact warranted are agreed upon by the parties, while the materiality and value of a representation must be determined by a court or jury. It

¹⁷ *Mayor, etc., of New York v. Brooklyn Fire Ins. Co.*, 43 N. Y. 465, 3 Abb. Dec. (N. Y.) 251; *Durand v. Thouron*, 1 Port. (Ala.) 238.

¹⁸ *Liverpool & London & Globe Ins. Co. v. Farnsworth Lumber Co.*, 72 Miss. 555, 17 South. 445.

will not often occur that anything in the nature of the fact itself will determine its character as a warranty or representation. Irrespective of their importance per se, facts may be given an artificial value and dignity by the agreement of the parties. This is frequently true in regard to warranties. It will often depend wholly upon the language of the contracting parties what position and value any particular fact has in reference to the enlargement or limitation of their obligations. If they choose to make it a warranty, it is easy to say so, and to employ such form of words as will leave no doubt as to their intention. When a fact is designated as a warranty, that will usually be the end of controversy; but, when the intention of the parties is involved in ambiguous phrase, courts must resolve the doubt, and this will be done consistently with the rule before stated,—to prevent forfeitures when it is possible to do so without unnatural interpretation or strained construction.

Referring to particular facts in the policy or application, and designating them as “warranties,” is not conclusive as to their character. This was held in the case of *Indiana Farmers’ Live-Stock Ins. Co. v. Rundell*.¹⁹ The insurance there was on a stallion, and the application, in answer to a pertinent question, stated that during the season before the horse had served seven mares, obtained five colts, and that the fee had been \$20. The court found that instead of five colts there was but one, and that the service fee was only \$10 to \$15; that it was never \$20. The facts stated were relevant to the question of values, and incidentally referred to the moral hazard of the risk. The policy was issued on the “warranties contained in the application.” Above the signature in the application of the defendant in error were the following words: “I warrant the above answers to each of the foregoing questions to be true.” The court then calls attention to the fact that in both the policy and application the statements referred to were, in various forms, designated as “representations.” It quotes from the application the following stipulation,—that “The insured has in no wise misrepresented or concealed any fact concerning said stock”; and from the policy, “This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented.”

¹⁹ 7 Ind. App. 426, 34 N. E. 588.

From this and other similar qualifying stipulations found in the printed terms of the policy, the court reached the somewhat singular conclusion that the statements made in regard to the service and value of the horse insured were not warranties, notwithstanding the direct and positive affirmance of that fact in both the policy and application, and in the latter over the signature of applicant.

This decision is perhaps chiefly valuable in showing how far a court will sometimes go, in the matter of construction, to save forfeitures. While the facts here involved do not appear to support the conclusion, the principle of construction recognized must be accepted as correct.

In *National Bank v. Insurance Co.*²⁰ it was said: "When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statement to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the insured the obligation of a warranty."

When one warrants the truth of a particular statement, it is the fact, and not the belief or good faith of the warrantor, that is involved. The insurer may suffer none the less because the applicant has intended no deception, but was himself honestly mistaken concerning the facts warranted. The insurer estimates the desirability of the risk, and its value, on the basis of circumstances affecting its character, which are warranted, and definitely made conditions upon which his obligation shall rest. If the facts are substantially different from those warranted, the insurer will not be held, not because he has been fraudulently dealt with, but for the equally valid reason that the agreement to pay a loss refers to different considerations. If a person, in discharging a debt of \$100, pays the creditor by mistake what both believe to be that sum, but what subsequently is ascertained not to be more than one-half that amount, the creditor is wronged, and there will be no complete acquittance, notwithstanding the good faith may not be questioned in which payment was made.²¹

²⁰ 95 U. S. 678; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466; *Grace v. Insurance Co.*, 109 U. S. 282, 3 Sup. Ct. 207.

²¹ *Elliot v. Life Ass'n*, 76 Hun, 378, 27 N. Y. Supp. 698; *Bernard v. Insurance Ass'n*, 8 Misc. Rep. 499, 28 N. Y. Supp. 756.

When a warranty is plain in respect to the duty of performance, but is indefinite as to the time or manner of its being done, the court must give it such reasonable construction as they would to any other contract. In *Crocker v. People's Mut. Fire Ins. Co.*²² Judge Shaw said: "The stipulation, 'A watchman kept on the premises,' as this in the body of the policy, immediately after the description of the property insured, is in the nature of a warranty, and must be substantially complied with by the assured. But the terms are not explicit as to the time and manner of keeping a watch. It does not stipulate for a constant watch. It therefore requires construction, as a matter of law, to determine what is meant in this policy by 'keeping a watch.' It relates to the factory,—to its safety against fire,—and this depends upon the habit or practice in this respect, and upon the fact whether that usage has been followed. When there is an express stipulation that a thing shall be done, but the contract is silent as to the time and manner, the law holds that it must be reasonable in this respect, having regard to the object and the purpose of the stipulation,—in this case, to the safety of the building. If it is done in the manner in which men of ordinary care and skill in similar departments manage their own affairs of like kind, this is only strong ground to hold it reasonable, and to warrant the admission of evidence of usage."²³

²² 8 Cush. (Mass.) 79.

²³ *Sheldon v. Insurance Co.*, 22 Conn. 235; *Frisbie v. Insurance Co.*, 27 Pa. St. 325; *Houghton v. Insurance Co.*, 8 Metc. (Mass.) 114; *Percival v. Insurance Co.*, 33 Me. 242; *Stout v. Insurance Co.*, 12 Iowa, 371.

In *Phoenix Assur. Co. of London v. Coffman* (Tex. Civ. App.) 32 S. W. 810, the policy warranted on the part of the insured that a watchman should be kept on duty at night. Special reference was made to the application, by the terms of which it was made a warranty that a watchman should be constantly kept on the premises on Sundays and during the nighttime, and at all times when work was suspended. A watchman was employed, and he was on the premises when the fire began, but the evidence showed that he was asleep. The court held that it was not warranted that the watchman should keep awake, and that the insurers were charged with the loss.

It is a safe rule, and one which the courts will inflexibly follow, that a warranty will not be presumed, nor its scope extended by implication. But is it using our plain English in its ordinary and reasonable sense when the word "watchman" is made to signify one who does not watch? In this case the warranty was to keep a watchman. Does not a person who goes to

In *Hanover Fire Ins. Co. v. Gustin*²⁴ the warranty was that "a watchman should be kept on the premises during the night, and at all times when the works were not in operation, or when the workmen were not present." The evidence was that the watchman had left the premises at 6:15 in the evening, and had not returned at 7:30, when the fire occurred. It does not appear that the watchman's absence from his place of duty was caused by sudden sickness, or from any unexpected or extraordinary exigency that could not have been provided for or put aside. He went to the central part of the town to make a purchase, thence to the railroad station to procure a ticket for a lady friend, and later to his dinner. The Nebraska court was of the opinion that the temporary absence of the watchman was not a breach of the warranty, and in support of this opinion refers to the language of Judge Shaw, above quoted.

It should be observed that the terms of warranty in the case which Judge Shaw was considering differed materially from those which the Nebraska court was called to construe in *Hanover Ins. Co. v. Gustin*; and it may be possible that the great Massachusetts jurist would have hesitated, and perhaps been more guarded in his declaration of the law, had he contemplated that he would be made responsible for legal doctrines of so questionable orthodoxy as those offered by the Nebraska court.

We find in *Thomas v. Commercial Union Assur. Co.*²⁵ an interesting discussion concerning a misdescription of the property insured. In the written portion of the policy the house was referred to and designated as a dwelling. On trial it was shown that the only occupancy of the building had been that of an hotel; that at the time of the insurance, and when the fire occurred, it was practically unoccupied,—inhabited by no one except a "care taker" or watchman.

sleep on duty lose his character as a watchman? The designation clearly refers to the duty to be performed, as well as to the person, and he who ceases to watch will also cease to be a watchman. If the agreement to keep a watchman does not carry with it, by fair implication, a promise that the person employed will perform the duties of watchman, then warranties are futile, and words have no distinct significance, when used to express a contract obligation. To say that one is a watchman who does not watch is no less absurd than to call that which is white, black, or that which is hot, cold.

²⁴ 40 Neb. 828, 59 N. W. 375.

²⁵ 162 Mass. 29, 37 N. E. 672.

The court treated the description incorporated into the policy as a warranty, and, being false, the insurer was held to be discharged from any payment of loss.

Testimony was offered by the plaintiff to show that the agent of the insurer, at the time of issuing the policy, understood the situation of the property and the character of its occupancy. This the court refused to admit, on the ground that its tendency would be to vary the terms of a written contract.²⁶

While the courts will guard with jealous care any infraction of the rule that a contract cannot exist partly in writing and partly in parol, there are many respectable authorities sustaining equitable estoppel under circumstances where this "hoary and venerable" rule is practically subverted. When, for illustration, it is warranted that the property insured is not incumbered, and investigation after a loss discloses the existence of mortgages, the claimant is permitted to show by parol testimony that he signed the application without reading it, and that the agent who filled it up had not stated the facts correctly as they were given to him; and thus the principle of equitable estoppel is often successfully invoked. However, there appears to be a concurrence of authority in support of the rule that a written contract cannot be varied by parol testimony in respect to any matter relating to subsequent performance.²⁷

²⁶ *Barrett v. Insurance Co.*, 7 Cush. (Mass.) 175; *Jenkins v. Insurance Co.*, 7 Gray (Mass.) 370; *McCluskey v. Insurance Co.*, 126 Mass. 306; *Batchelder v. Insurance Co.*, 135 Mass. 449.

²⁷ It was in evidence at the trial that it had been explained to the agent who filled up the application that no regular watchman was employed, but that, as the mill was operated most of the time night and day, there was generally some one about to care for the property. The court held that the insurer was estopped. *German-American Ins. Co. of New York v. Hart*, 43 Neb. 441, 61 N. W. 582.

Statements made warranties must be true, irrespective of the fact that the statements may have been made with no intention to deceive. *Standard Life & Accident Ins. Co. v. Lauderdale*, 94 Tenn. 635, 30 S. W. 732.

An insurance company has the right to determine the conditions upon which it will issue a policy. When these conditions are expressed, and made part of contract, their materiality is settled. *Fidelity & Casualty Co. v. Alpert*, 14 C. C. A. 474, 67 Fed. 460; *Mechanics' Ins. Co. v. Thompson*, 57 Ark. 279, 21 S. W. 468; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425;

In *Garretson v. Merchants' & Bankers' Ins. Co.*²⁸ the policy prohibited the use of gasoline in the building insured. It was admitted that there was a gasoline stove, and the plaintiff sought to excuse its use, and save a forfeiture on account of the alleged violation of the condition referred to, by pleading and offering to show that the privilege written in application, "to use building for any mercantile purpose," carried with it permission to occupy for restaurant, and the use of gasoline stove as one of the incidents of such occupation. The Iowa supreme court, in construing the language of the application, said: "The business of keeping a restaurant is in no sense commerce. If a restaurant be a mercantile establishment, the term is equally applicable to taverns, boarding houses, and the like, which cannot be admitted. The point demands no further attention. Permission to use buildings 'for any mercantile purpose' does not authorize their use as a restaurant."

There was evidence at the trial which tended to show that the soliciting agent of the defendant had knowledge that the building insured was occupied as a restaurant; but as such agent had no authority to issue policy, or to bind defendant company by a completed contract, he had no power to waive a forfeiture resulting from the breach of warranty in regard to occupancy, and the use of gasoline on the premises. The language of the court was: "If it be assumed that defendant's agent had knowledge of the use of the building as a restaurant, and assented thereto, and even knew of and assented to the use of the gasoline stove, defendant is not bound thereby, for the reason that the agent did not act within the scope of his authority."

There is a class of cases where certain facts have been warranted, and the insurer estopped, after a loss, from setting up their untruth-

Providence Life Assur. Soc. v. Reutlinger, 58 Ark. 528, 25 S. W. 835; *Alston v. Insurance Co.*, 4 Hill (N. Y.) 329; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106 (see *Id.*, 55 Ill. 213); *Blumer v. Insurance Co.*, 45 Wis. 622; *Id.*, 48 Wis. 535, 4 N. W. 674; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Walroth v. Insurance Co.*, 10 U. C. Q. B. 525; *Battles v. Insurance Co.*, 41 Me. 208; *Smith v. Insurance Co.*, 25 Barb. (N. Y.) 497; *Baker v. Insurance Co.*, 64 N. Y. 648; *Merwin v. Insurance Co.*, 7 Hun (N. Y.) 659; *Parker v. Insurance Co.*, 10 Gray (Mass.) 302; *Boggs v. Insurance Co.*, 30 Mo. 63.

²⁸ 81 Iowa, 727, 45 N. W. 1047.

fulness to defeat the insurance, on the ground that the agent who took the application or wrote the policy had full knowledge, and that the company had not acted under a misapprehension of the facts when completing the contract and receiving the premium. The application of the doctrine of equitable estoppel in this class of cases is based on the idea that the law, in its administration, should not be made the agency of injustice and wrong; that the insurer, having been informed of the character and circumstance of the risk before the payment of the premium, will not afterwards be permitted to escape liability for the technical reason that the facts fully disclosed were not set out in the application, which was incorporated into the policy, and made a warranty.²⁹

§ 136. May the Written Evidence of Warranty be Set Aside by the Parol Testimony of an Interested Witness?

This would, of course, be a simple and righteous solution of a not infrequent problem presented to the courts, were it not for the fact that it creates another problem, of equal difficulty, concerning the choice of evidence for establishing the verity of contracts. The old rule that "parol testimony cannot be received to vary the terms of a written instrument" recognizes the writing as the best evidence of what it was that the parties at the time understood and agreed to. "Equitable estoppel," in cases of this kind, must mean that this long-established and conservative rule shall be put aside, and that the oral testimony of an interested party may take its place.

The policy contained a warranty that there was "one chimney;

²⁹ *Stone v. Insurance Co.*, 68 Iowa, 737, 28 N. W. 47; *Mullin v. Insurance Co.*, 2 New Eng. Rep. 483, 54 Vt. 223; *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016; *Dunbar v. Insurance Co.*, 72 Wis. 492, 40 N. W. 386; *Menk v. Insurance Co.*, 76 Cal. 50, 14 Pac. 837, and 18 Pac. 117; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291; *Pickel v. Insurance Co.*, 119 Ind. 291, 21 N. E. 898; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 South. 143; *Western Assur. Co. v. Rector*, 85 Ky. 294, 3 S. W. 415; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. (Tenn.) 352; *McBride v. Insurance Co.*, 30 Wis. 562; *Cheek v. Insurance Co.*, 4 Ins. Law J. 99; *Parker v. Insurance Co.*, 34 Wis. 363; *Chatillon v. Insurance Co.*, 27 U. C. C. P. 450; *Home Ins. & Banking Co. v. Lewis*, 48 Tex. 622; *Texas Banking & Ins. Co. v. Stone*, 49 Tex. 4.

one stove well secured; pipe passes through crock well secured." The policy provided, in suitable language, that it should become void if there were any false descriptions by assured concerning either building or contents, or if he omitted to make known any fact which increased the hazard. There was a further provision that the company should not be liable for any loss occasioned by the use of fires in buildings unprovided with stone or brick chimneys.

The evidence at the trial disclosed that there was no chimney or crock, and that when the first fire was built in the stove the whole property was consumed. The court held that the plaintiff, knowing that his representations concerning the character and circumstances of the hazard were false, could recover nothing, and that the situation was in no sense relieved by the fact that the agent who took the risk was on the ground, made the survey, and knew all the facts; that the misrepresentations were for the benefit of the insured, and, being made with the knowledge and concurrence of the agent, were in fraud of the company.³⁰

§ 137. Is it within the Province of the Court to Annul a Promissory Warranty Because Such Warranty Contemplates Changes in the Circumstances of the Risk?

It was held by the Mississippi court, in the case of *Liverpool & London & Globe Ins. Co. v. Farnsworth Lumber Co.*,³¹ that an express warranty could not be enforced, which required that thereafter a clear space of a specified number of feet should be maintained, because no such clear space existed at the time the insurance was effected, which fact was known to the agent who solicited the risk.

We are of the opinion that this decision has the double infirmity of being repugnant to the "customs of business," and the "reason of the law." The warranty, in its form as well as its purpose, was clearly *in futuro*, and not *in præsentia*. From the nature of the engagement, and the uses contemplated, it might be a matter of no importance to the underwriter what the situation of the property was at the time the insurance was negotiated; and it might, too, be a

³⁰ *Smith v. Insurance Co.*, 24 Pa. St. 320. ³¹ 72 Miss. 555, 17 South. 445.

matter of so much importance as to what the conditions should thereafter be, that the changes required would be made the subject of a promissory warranty. Cannot a mill owner or manufacturer, seeking insurance, stipulate to make beneficial changes in the condition of his risk, in order to obtain policies on more favorable terms, or for any other reason of sufficient importance to influence his will in the matter? If he may promise to improve the hazard, what valid objection, in law or in reason, can be urged against making the performance of that promise a condition precedent? Shall A. be prohibited from selling wheat to D. for future delivery, and shall such contract, when made, be declared a nullity, if it is known to the vendee at the time of the sale that the vendor owns no wheat? What interest of public policy or public morality is imperiled by a millowner, in the exercise of his natural and constitutional right, obtaining insurance at a lower rate of premium by warranting that certain piles of lumber shall be removed to a greater distance from his mill, and that thereafter, and during the term of the insurance, a designated space shall be maintained? If this is not a matter in which the public is concerned, what is there to justify this restriction of the liberty of the citizen in making contracts relating to matters that are purely personal? What rights secured to us by the constitution are more important than those of "liberty and the pursuit of happiness"; and is liberty anything more than a name, if we are not permitted to manage our own affairs,—to make contracts concerning all legitimate subjects which it will be the duty of the courts to enforce, and never their right to annul?

§ 138. The Right of Persons to Make Contracts Concerning All Subjects That Refer to the Ordinary Affairs of Life is a Constitutional One, and Cannot be Taken Away, by Construction or Otherwise.

It was said in *Leep v. Railway Co.*:³² "When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the

³² 58 Ark. 407, 25 S. W. 75.

legislature can interfere for the purpose of prohibiting the contract, or controlling the terms thereof."

In *Ritchie v. People* ³³ Justice Magruder said: "Section 2 of article 2 of the constitution of Illinois provides that 'no person shall be deprived of life, liberty or property without due process of law.' * * * The privilege of contracting is both a liberty and a property right. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. The right to use, buy, and sell property, and contract in respect thereto, is protected by the constitution. Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner. In this country the legislature has no power to prevent persons who are sui juris from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor, or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty above quoted. * * * The protection of property is one of the objects for which free governments are instituted among men. The right to acquire, possess, and protect property includes the right to make reasonable contracts; and when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property, within the meaning of the constitution. The fundamental rights of Englishmen, brought to this country by its original settlers, and wrested from time to time, in the progress of history, from the sovereigns of the English nation, have been reduced by Blackstone to three principal or primary articles: 'The right of personal security, the right of personal liberty, and the right of private property.' The right of contract is the only way by which a person can rightfully acquire property by his own labor. Of all the rights of persons, it is the most essential to human happiness."

This statement of the law by Justice Magruder recalls for the thoughtful attention of patriotic and intelligent citizens the essential principles of liberty and justice upon which the foundations of free and protective governments rest. If we would preserve for future generations our civil institutions, we must resist every distinct depar-

ture from the principles of the constitution. In these days there is a marked tendency to crowd aside conservative rules, that there may be opportunity to experiment with new theories of social and political reform. With these departures and with these experiments come new dangers to the state.

The constitution may be subverted by the very agencies created to preserve it, and in the name of law and human rights a despotism may grow up that will defy the constitution, and leave our personal liberty only a name, and that to be pronounced by those who come after us with derision. The best hope of the future lies in our restricting legislation to its constitutional limitations, and it is to the courts chiefly that we must look for the repression of these encroachments upon the inalienable rights of the citizen that now threaten our peace and stability.

§ 139. Warranties and Conditions Precedent Essentially Alike.

Warranties and the conditions precedent of the insurance policy, while different frequently in form, are in their elements and legal effect essentially the same. Both must be literally kept or performed. In this affirmation all authorities agree. Whenever doubt has arisen, it has proceeded from the obscurity of the language employed to express the intention of the parties. When the conditions of the policy call for a disclosure of certain facts, such as title, incumbrance, occupation, or other insurance, under penalty of forfeiture, concealment or failure to comply will be fatal to recovery in case of loss. These provisions incorporated into the contract to secure a better understanding of the hazard, and to protect the insurer against fraud, are sometimes designated as "warranties," and sometimes as "conditions precedent."³⁴

In the case of *Baker v. German Fire Ins. Co.*³⁵ the supreme court of Indiana uses the terms synonymously. The court said: "The statement that the building insured was 'occupied as an hotel, with

³⁴ *Smith v. Insurance Co.*, 118 N. Y. App. 518, 23 N. E. 883, and 19 Ins. Law J. 374.

³⁵ 124 Ind. 490, 24 N. E. 1041.

bar and billiard room attached,' inserted in the face of the policy, constitutes an express warranty that the building was so occupied at the time the policy was issued, and the validity of the contract depends upon the truth of the stipulation. * * * The phrase 'occupied,' etc., relates to the character of the risk at the same time the contract was made, and was in the nature of a condition precedent to the taking effect of the policy."

In *Allen v. German-American Ins. Co.*³⁶ the New York court of appeals said: "Parties may insert any provision they choose in contracts, provided they violate none of the rules of law, and they should all be given their appropriate and intended effect. The warranty inserted here was that the policy should be void if the insurer should thereafter obtain other insurance on the property in excess of a certain stated sum. The assent of the plaintiff to this provision is conclusively presumed from his acceptance of the policy. In that respect he voluntarily fettered himself, and submitted to the defendant's conditional acceptance of the risk proposed."

It will be observed that the court treats the provision of the policy in reference to other insurance as a prohibitory warranty. This, it appears to us, is the true character to be given to policy conditions, whether they are so framed as to promise absolutely the performance of any particular thing, or to prohibit anything which the parties may have agreed should be interdicted.

See, also, *Jefferson Ins. Co. v. Cotheal*,³⁷ where the court declared that "a warranty is considered as a condition precedent, and, whether material or immaterial as regards the risk, must be complied with before the assured can sustain an action against the underwriter."

In *Boyd v. Vanderbilt Ins. Co.*³⁸ the policy described the property insured as a "one-story frame dwelling house, occupied by good tenants as such." On the trial it was shown by competent evidence that the house was unoccupied at the time the policy was issued, and so continued for several months subsequently. Some time after the property was insured, and before the fire, plaintiff, Boyd, notified the insurer that the house was vacant; and its agent, the secretary, re-

³⁶ 123 N. Y. 6, 25 N. E. 309.

³⁷ 7 Wend. (N. Y.) 73.

³⁸ 90 Tenn. 212, 16 S. W. 470.

plied that it was "all right." This was claimed by the plaintiff as a waiver on the part of the defendant of its right to declare a forfeiture on account of the breach of warranty, if such right had ever existed. To this proposition the court declared its dissent. Lurton, J., said: "The facts show that this house had not been occupied for nearly a month before issuance of the policy, and that it continued vacant until burned, nearly a year afterwards. During this time the unoccupied premises were used by wagoners and tramps as a camping place. The notice given the secretary was not earlier than November [the policy was issued in March]. * * * A consent to a vacancy occurring during the life of the policy would not be a waiver of the warranty that the premises were occupied at the inception of the contract. * * * Notice of such a vacancy, and consent thereto, would only operate to waive the clause of the policy forfeiting it for the vacancy without consent during life of the policy. This * * * contract had never had any validity, and life could not be given to it unless the company, with full notice, consented to its continuance. Faith and fair dealing required that all the facts should have been stated. * * * The evidence of plaintiff as to what he said to the secretary does not show that he informed him of the nonoccupancy at issuance of the contract." This ruling is based on a well-settled principle of law,—that knowledge must precede waiver. There can, of course, be no intention to relinquish a right without first knowing that the right exists; and in recognition of this rule the Tennessee court has held that the insurer only waived its right to insist on a forfeiture because of the vacancy that existed at the time the notification was given, and as to the other fact which had been withheld—that the house was vacant at the inception of the contract—the case was otherwise. The stipulation expressed upon the face of the policy in regard to occupancy the court construed to be a warranty, and as the house was then vacant the undertaking to insure had failed. The policy was of no effect from the beginning, and the waiver of a subsequent fact would not be sufficient to vitalize and re-establish the original promise to insure on the part of the company, for the reason that that promise rested upon another and wholly independent consideration,—a warranty that the house was then occupied by good tenants.

The trial judge instructed the jury that: "The statement in the

policy in this case, on the 'one-story frame dwelling house, occupied by good tenants as such,' is a representation by the plaintiff to the defendant that at the time the policy was issued the building was really occupied, and the condition upon which the contract of insurance was based; and, to entitle the plaintiff to recover, it must have been true. Therefore, if you find the building was vacant, and that the defendant was ignorant of the fact, this avoids the policy, and your verdict should be for defendant. This is the law, even though the statement be made in ignorance, and without any desire to misrepresent any of the facts." Justice Lurton, of the supreme court, said that this charge "was a succinct statement of the law," and then quotes approvingly Arnold's definition of "warranty," found in section 577 of his work on Insurance: "Warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the contract depends."

Judge May expresses his satisfaction with this definition of Mr. Arnold's, and, as if for the purpose of giving a greater amplitude of expression, adds, "By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty or forfeiture of his right to recover in case of loss, should the statement prove untrue, or the course of conduct be unfulfilled."

§ 140. Warranty Concerning the Quantity of Land Comprising the Premises Insured.

When insurance is taken on farm property, the applicant is frequently required to state the number of acres owned by him, comprising the premises on which the property insured is situated. Such statements are not merely descriptive, and should be made with due consideration to their importance, when, with proper form of words, they are incorporated into the policy, and made warranties. While such literal exactness as would include the fractional part of an acre, perhaps, might not be necessary to save the warranty, it is required that the statements should be substantially true. This question was considered by the court in the case of *Bennett v. Agricultural Ins. Co.*³⁹ The plaintiff stated in his application that the

³⁹ 50 Conn. 420, 13 Ins. Law J. 817.

premises consisted of 60 acres of land. The testimony on the trial showed that the quantity of land was less; in fact, that there were but $46\frac{3}{4}$ acres. The trial court held that the statement was only a representation, that the number of acres was immaterial, and that the policy was not voided. On appeal the case was reversed, and the appellate court said: "In the first place, the parties having expressly stipulated and intended to make the statements in the application technical warranties, rather than representations, it might be presumed that the assured weighed his words more carefully, and made statements of fact, rather than of mere opinion."

The court here intimates, by the use of the term "technical warranties," that this decision rests upon a naked legal right. To this conclusion we are compelled to dissent. When insuring farm property, time is generally given for the payment of the premium. As a basis of credit, it is therefore important that the insurer should have accurate information in regard to the character and amount of property which the applicant owns, whether it is incumbered or otherwise. Again, too, as affecting the moral aspects of the hazard it is asked to assume, it will often be important for the insurer to know whether the buildings or other property specified in the proposal for insurance are adapted for the convenient and profitable use of such a farm as the applicant owns. If the dwelling or barn were small and cheaply constructed, and the farm large and valuable, there would perhaps be less capacity than was required for indispensable uses. Then appearance and want of style might be repugnant to the taste and pride of the owner. On the other hand, if the farm is small, and the buildings large and expensive, this fact would sometimes imply that the expenditure for improvements had not been judiciously made, and that more capital had been invested than could, in the ordinary uses, be made profitable. In either of these cases the owner would have no motive to exercise a watchful care to protect the property insured against accident from fire. His interests, in fact, would be promoted by the destruction of the buildings he could not use to advantage, and which he could not otherwise dispose of without financial loss. It is this perilous condition of things which the prudent underwriter has sought to avoid by inquiries so careful and full, in regard to all facts affecting both the moral and physical hazard, that his questions will sometimes appear

to the inexperienced as irrelevant, and intended to create a technical advantage. There is a very clear distinction to be observed between the equitable basis of the warranty in the case here considered, and one that is purely technical; and we may refer, for the purpose of better illustrating the point by comparison, to the warranty in regard to the incumbrance in the hail-storm policy. *Johnson v. Dakota Ins. Co.*, *supra*.

In *Russell v. Cedar Rapids Ins. Co.*⁴⁰ the policy was issued on an application, which was made a part, and which described the premises as a tract of land consisting of 280 acres. There was a mortgage of \$1,600, of which notice was duly given. Subsequently 200 acres of the land were sold, and another lot, consisting of 40 acres, was purchased. At that time the mortgage indebtedness was reduced to \$1,000. It was provided that the policy would become void if the risk were increased in any manner, except the erection of necessary buildings, or if the property was sold, or any change should take place in the title. Given, C. J., in delivering the opinion of the court, said: "If the incumbrance remaining upon the land unsold should be less in proportion to the quantity than was upon the land when the policy was issued, there was surely no breach of the condition against incumbrances. Or if, for any reason, the hazard should not be increased by the change, so that no higher rate of premium would be demanded, there would arise no violation of the condition. The question, then, in order to determine whether there has been a breach of the condition, is this: Was the risk increased, or was defendant's security decreased, by the change of the incumbrance? This is a question of fact, and should have been left to the jury. We think the same rule applies to the sale of parts of the land, and the purchase of other lands, and to any change in the use made of the insured premises. It was proper for the jury to determine what changes, if any, had been made in the incumbrances, title, or use of the premises, and whether by such changes the risk was increased, or the defendant's security decreased. Though there were changes in the respect alleged, if they did not increase the risk, or decrease the security, then there was no breach of the condition as to title, incumbrance, or use; but, if there was such a change in

⁴⁰ 78 Iowa, 216, 42 N. W. 654.

either respect as did increase the risk or decrease the security, then there was a breach of the condition. The testimony set forth in the record shows beyond controversy that, notwithstanding the payment of \$600 of the incumbrance, yet the sale of the part of the lands upon which the \$1,600 rested, and the renewal of the incumbrance on the remaining lands, was in fact an increase of the incumbrance upon the lands unsold. It also appears that the plaintiff's interest in the lands purchased was not equivalent to her interest in the lands sold, and hence there was a decrease of the security to the defendant. Under the state of the evidence, we think the court should have sustained the defendant's motion for verdict on the ground that the uncontroverted evidence shows an increase of the incumbrance, and a decrease of the security."⁴¹

§ 141. When Warranties are in *Præsenti*, and When Continuing.

A careful examination of the authorities shows that the courts do not always distinguish between warranties in *præsenti* and those that are continuing. Where it is written on the face of the policy that the building is occupied for a particular purpose, it is a warranty that it is so occupied at the time; but should it subsequently be occupied differently, unless in violation of some other condition of the policy, there will be no avoidance. This construction, it appears to us, is illogical, and without equitable support. A "warranty" is frequently defined as a representation of a state of facts that has induced either one party or the other to assent to the contract. It involves a grossly absurd proposition to say that a party may be led into a contract that will continue for a term of months, or perhaps years, on the basis that certain material facts are warranted, which may be changed immediately after the obligation has been assumed. Of what importance is it to the insurer to know that the building insured is, at the inception of the insurance, occupied as a dwelling, and has the care and protection of a family living in it, if, as soon as the policy is written and delivered, the

⁴¹ *Pangborn v. Insurance Co.*, 67 Mich. 683, 35 N. W. 814, and 17 Ins. Law J. 224; *Id.*, 62 Mich. 638, 29 N. W. 475, and 16 Ins. Law J. 62.

premises may be transformed into a planing mill or powder house without the insurer's consent? The justness of this criticism is recognized by the leading authorities, and warranties in regard to water supply, appliances for suppressing fires, watchman, etc., have generally been held to be continuing.

In *Glendale Woolen Co. v. Protective Ins. Co.*⁴² it was answered by the assured, in response to a question contained in the application, that "there was a watchman in the mill during the night," and it was held that the question and answer constituted a continuing warranty that a watchman should be kept in the mill every night during the term of the insurance.

There are many other reported cases where this doctrine of continuing warranty has been fully sustained.⁴³

Warranties in regard to occupancy are generally continuing, as from the nature of the case they should be. In *Sun Mut. Ins. Co. v. Texarkana Foundry & Machine Co.*⁴⁴ this question was fairly discussed by the court. The policy there provided that the building insured was to be occupied as a foundry and machine shop. The court said it was a warranty that it should be thus occupied.⁴⁵

"In some cases, statements as to the use and occupation of property have been held warranties. Thus, the description must be true where the property is insured as a stock in a brick building occupied as a storehouse;⁴⁶ a paper mill;⁴⁷ a dwelling house;⁴⁸ a machine shop.⁴⁹"

⁴² 21 Conn. 19.

⁴³ *Sheldon v. Insurance Co.*, 22 Conn. 235; *Houghton v. Insurance Co.*, 8 Metc. (Mass.) 114; *Blumer v. Insurance Co.*, 45 Wis. 622.

⁴⁴ (Tex. App.) 15 S. W. 34.

⁴⁵ *Sun Ins. Co. v. Texarkana Foundry & Machine Works Co.*, 3 Willson, Civ. Cas. Ct. App. § 320; 4 Wait, Act. & Def. p. 38.

⁴⁶ *Wall v. Insurance Co.*, 7 N. Y. 370.

⁴⁷ *Wood v. Insurance Co.*, 13 Conn. 533.

⁴⁸ *Sarsfield v. Insurance Co.*, 61 Barb. (N. Y.) 479; *Alexander v. Insurance Co.*, 66 N. Y. 464.

⁴⁹ *Goddard v. Insurance Co.*, 108 Mass. 56.

§ 142. Conclusions.

A warranty must be substantially, if not literally, true, whether the fact warranted is material or not.

It will not be the duty of the court to inquire into the materiality of a warranty, and any evidence offered for that purpose will be incompetent. What the parties have agreed to, unless repugnant to law, will be conclusive.

When, by reason of obscure or ambiguous language, a doubt exists whether it was the intention of the parties that a fact should be regarded as a warranty or a representation, the courts will give such construction as will be most favorable to the insured.

A warranty will never be presumed, nor will its scope be enlarged by implication. It has such rigor in its character, and such dominating influence in the construction and performance of a contract, that it can exist only by the express agreement of parties.

When the truth of a particular statement is warranted, it is the fact, and not the belief or good faith of the warrantor, that is involved. It will not excuse the breach of a warranty to show that the warrantor honestly supposed the facts to be as warranted.

The principle of equitable estoppel will not apply to relieve a forfeiture, because the facts, either represented or warranted, were known to the agent of the insurer to be untrue. The insured, colluding with the agent to defraud the company, can take nothing by his wrong.

While warranties differ from conditions precedent in form, in the rigor of their character and ultimate purpose they are essentially the same.

CHAPTER VIII.

VACANT OR UNOCCUPIED.

- § 143. Importance of the Condition Concerning Vacancy.
- 144. What is Occupancy?
 - 145. When Occupied at the Time of the Loss.
 - 146. Occupancy will be Determined in Reference to Character of the Risk.
 - 147. Policy Conditions will be Construed Strictly in Respect to Occupancy.
 - 148. If the Property is Vacant at the Time the Insurance is Effected, with Knowledge of the Insurer, will Estoppel Apply?
 - 149. What Constitutes Occupancy is a Question of Law—Construction of Contract.
 - 150. That the Risk is Increased When the Property is Vacant, the Courts will Take Judicial Notice.
 - 151. *Animus Revertendi*.
 - 152. When a Condition has been Broken, and the Forfeiture Waived, the Waiver will not Continue to Relieve Later Forfeitures, Arising from New Breaches of the Same Condition.
 - 153. Application of the Rule that Contract is Entire.
 - 154. What Constitutes Vacancy.
 - 155. When Insured Knows that Agent is Disobeying the Instructions of His Principal, in Granting Privileges or Waiving Conditions, Such Acts will be without Legal Effect.
 - 156. Conclusions.

§ 143. Importance of the Condition Concerning Vacancy.

Among the most important of the prohibitory conditions of the fire insurance policy is that in regard to the insured property becoming "vacant or unoccupied." There are but few lessons that the careful and intelligent underwriter has better learned and better remembered than the one that vacant buildings burn more frequently than those that are either inhabited or occupied for storage, business, or other useful purposes. The reason of this is easy of explanation. There is not "a weak or cracked link in the chain" connecting useless and abandoned buildings and the lurid conflagration. When motive and opportunity join, action results. When one is supplied and the other wanting, there is always statu quo. When property of this class is left unwatched, there is presented an opportunity for the

perpetration of a crime; and a motive may be frequently found in the fact that the property abandoned or left without an occupant is unproductive, and hence unprofitable. It may be safely stated as a general proposition that buildings not in use constitute undesirable investments. Fortunately, the advanced moral and social conditions, the improved average business integrity, and the restraints of conscience do not permit of the conversion of all unproductive property in the manner here suggested. But it is incumbent on the insurer to be watching for exceptional cases. For strictly legitimate hazards, a rate can be computed that will not be burdensome and unjust to the insured, and one that will afford the underwriter a reasonable profit for his venture. The fire insurance office collects premiums from the many to pay losses to the few. When loss claims become more numerous on account of frauds or imprudent underwriting, larger sums must be gathered from the householder, the merchant, and the manufacturer to pay the increased demands. There is, perhaps, no business undertaking in which the general public is more directly concerned than that of insurance. Every person, in fact, who holds a policy or has property to insure, is in an important sense a partner in the business. He is interested in the same manner that the taxpayer is concerned in the prudent and economical management of the public funds. If there is waste, speculation, or robbery, the loss in either case must be made good by increased levies. It is important to every honest property owner that the insurance company shall pursue its business in a careful, guarded manner, in such a way as to put no temptation before the evil doer, or those who would become such, under a promise of gain that would silence conscience, and put aside the ordinary considerations of honor and duty. Independent of the bad moral hazard which attaches in a large number of cases to unoccupied and unproductive property, the withdrawal of constant and watchful care of the owner or his tenant affords exceptional opportunities for tramps and prowling vagabonds to make the unoccupied building a convenient resort and temporary place of abode. Their reckless and often criminal habits will create additional elements of danger, and the character of the hazard become so changed that every consideration of prudent and legitimate underwriting will require that the risk be refused. It is not the duty of the insurance company to watch unoc-

cupied property. From the nature of the case, it is impossible for them to do so. This duty must be performed by the owners, and it is not more a right than an obligation on the part of the insurer to place this burden where it properly belongs. The courts have very generally accepted this view of the matter, and, on equitable grounds, have excused the insurer when the buildings protected by its policies are vacant or unoccupied, contrary to the conditions agreed to. This provision of the insurance contract has been the cause, perhaps, of more litigated cases than any other. The contention has seldom been as to the validity of the prohibition. While that has been conceded, it has been urged in each particular case either that the condition had been waived by the company insuring, or that the facts presented did not show that the property was without an occupant, within the meaning of the policy, when the fire occurred.

§ 144. What is Occupancy?

A very proper distinction has generally been made between the word "vacant" and the word "unoccupied." A mill or any manufacturing establishment will not be "vacant," in the literal or even popular meaning of the word, while the machinery, tools, or any implements for carrying on the business are remaining in the building; but it is held that a factory, mill, or shop is "unoccupied," within the meaning of the policy, when it is abandoned for its ordinary uses. When it ceases to be operated, and the workmen have departed, not intending to again return, then occupation has terminated; and, should a fire occur, the insurer would not be charged with the loss.¹

This distinction is perhaps more clearly marked in the case of a dwelling house from which the family has removed, leaving a portion of their household goods in the building. It will not be vacant, but occupation is at an end when it is no longer the place of abode

¹ *Wustum v. Insurance Co.*, 15 Wis. 138; *Keith v. Insurance Co.*, 10 Allen (Mass.) 228; *Ashworth v. Insurance Co.*, 112 Mass. 422; *American Ins. Co. v. Padfield*, 78 Ill. 167; *Paine v. Insurance Co.*, 5 Thomp. & C. (N. Y.) 619; *Abrahams v. Association*, 40 U. C. Q. B. 175; *Corrigan v. Insurance Co.*, 122 Mass. 298; *Sleeper v. Insurance Co.*, 56 N. H. 401, overruling *Chamberlain v. Insurance Co.*, 55 N. H. 249; *Hill v. Insurance Co.*, 58 N. H. 82, 6 Ins. Law J. 314; *Cook v. Insurance Co.*, 70 Mo. 610; *American Ins. Co. v. Foster*, 92 Ill.

of any living person. A temporary absence of the family will not avoid the policy. They may absent themselves for purposes of health, pleasure, business, or convenience for any reasonable period, if they go with the intention of returning again, and the building insured continues to be their home.² This general proposition, however, must be understood with certain special qualifications. The absence must be only temporary, and, if extended beyond a reasonable time, the insurer will be relieved.

The case of *Traders' Ins. Co. v. Race*³ affords an excellent illustration of the principle here stated. In the dwelling insured and subsequently burned, no one had lived continuously for several

335; *Herrman v. Insurance Co.*, 85 N. Y. 162, reversing 45 N. Y. Super. Ct. 394; *Barry v. Insurance Co.*, 35 Hun (N. Y.) 601.

A dwelling house is unoccupied when no one lives in it. *Sonneborn v. Insurance Co.*, 44 N. J. Law, 220.

Leaving a pail, scrub brush, and mop is not occupancy. *Litch v. Insurance Co.*, 136 Mass. 491, 13 Ins. Law J. 381.

Farm building used occasionally by farm hands not occupancy. *Fitzgerald v. Insurance Co.*, 64 Wis. 463, 25 N. W. 785, and 15 Ins. Law J. 277.

Using dwelling house as saloon increases the risk. *Western Assur. Co. v. McPike*, 62 Miss. 740.

Leaving in house a few articles of furniture is not occupancy. *Moore v. Insurance Co.*, 64 N. H. 140, 6 Atl. 27; *Sexton v. Insurance Co.*, 69 Iowa, 99, 28 N. W. 462; *Hartshorne v. Insurance Co.*, 14 Atl. 615, 50 N. J. Law, 427.

Dwelling house, to be occupied within the meaning of policy, must be inhabited. *Weidert v. Insurance Co.*, 24 Pac. 242, 19 Or. 261, and 19 Ins. Law J. 740; *Craig v. Insurance Co.*, 34 Mo. App. 481.

Manufacturing plant closed, and left in charge of one living on the premises, is not occupancy. *Halpin v. Insurance Co.*, 118 N. Y. 165, 23 N. E. 482; *Id.*, 120 N. Y. 70, 23 N. E. 988, 19 Ins. Law J. 459, and 43 Balt. Underwriter, 257.

Leaving some one to look after a vacant dwelling does not constitute occupancy. *Bonefant v. Insurance Co.*, 76 Mich. 653, 43 N. W. 682; *Agricultural Ins. Co. v. Frith*, 21 Ill. App. 593; *Richards v. Insurance Co.*, 83 Mich. 508, 47 N. W. 350, and 20 Ins. Law J. 366; *England v. Insurance Co.*, 81 Wis. 583, 51 N. W. 954.

² *Hill v. Insurance Co.*, 99 Mich. 466, 58 N. W. 359; *East Texas Fire Ins. Co. v. Kempner* (Tex. Civ. App.) 25 S. W. 999; *Home Ins. Co. v. Scales*, 71 Miss. 975, 15 South. 134; *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb. 846, 45 N. W. 171; *Dohlantry v. Insurance Co.*, 83 Wis. 181, 53 N. W. 448.

Vacancy presumed an increase of risk. *White v. Insurance Co.*, 85 Me. 97, 26 Atl. 1049.

³ 15 Ins. Law J. 633.

months. It was frequently visited and aired, and the furniture in use when the house was inhabited by the family remained in its accustomed place, a Mr. Race, brother of the owner, occasionally sleeping on the premises; but the court held that "the occupancy was not such as the law required in order to save the condition of the policy. The visitation of the various members of the Race family upon the premises, and the sleeping therein by the hired man or Richard Race, may have served a useful purpose, as a protection against marauders or burglars, and even as a prevention of fire; but neither one nor both was sufficient. In the case at bar, both a living in the house and the *animo manendi* as to the customary place of abode were wholly lacking. The house in question was visited, and at night stayed in for a special purpose, that of watching it, and not for the general and useful purpose of abode or dwelling."

In *Herrman v. Adriatic Fire Ins. Co.*,⁴ the dwelling insured was the usual abiding place for the plaintiff and his family during the warm weather; was what is known as a summer residence; and, while the family was elsewhere during the cold season, all furnishings were left in the house, which was always ready for occupancy. Mr. Herrman and his wife visited the place fortnightly. The house was aired once a week, and, besides, received other unimportant attention and supervision from servants. The court held that this was not sufficient to constitute occupancy. It said: "For the dwelling house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolute and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage."

§ 145. When Occupied at the Time of the Loss.

Insurance policies uniformly provide, in suitable but different words, that, if the insured property "becomes vacant or unoccupied

⁴ 85 N. Y. 162.

In case of *Western Assur. Co. v. Mason*, a different ruling was had. 5 Ill. App. 141.

So, also, *Stupetski v. Insurance Co.*, 43 Mich. 373, 5 N. W. 401, and 9 Ins. Law J. 521; *Herrman v. Insurance Co.*, 81 N. Y. 184. The provision of the policy was that it should be void if the property became vacant and unoccupied. Court held that it must be both.

without consent of the company, the policy shall be void." Sometimes the avoidance, it is stipulated, shall not occur until the expiration of some fixed period of indulgence or grace, as 10 or 20 days.

Regarding the purpose of this provision to be the protection of the insurer from such changes in the circumstances of the risk as would increase the hazard of fire, the courts have sometimes held that although the building becomes vacant and unoccupied during the term of the policy, if it was actually occupied when the fire occurred, the insurer would be held.⁵ These decisions appear to be based on the principle, which is not exactly cardinal in the law, that "substantial justice" must be secured at all hazards. It must be admitted that if no harm comes to the risk during the period of its abandonment, and if it is in the care of an occupant at the time of the loss, no important interest of the insurer is prejudiced on account of the temporary vacancy; and in such case there is an apparent hardship to the honest claimant if the insurer is excused from paying the loss. But may the courts properly interfere to prevent the execution of a contract which the parties were competent to make, and did make in the exercise of their natural and constitu-

⁵ In case of *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379, it was provided that the policy should be void if, without the consent of the company, mechanics should be employed on the premises to make other than ordinary repairs, without notice to and permission of the company. Considerable changes and improvements were made, by which mechanics of different kinds were employed, for several weeks; but the work was all completed, and the workmen dismissed, before the fire occurred. It was held by the supreme court of the United States that the forfeiture took place and the policy became void at the time the condition in regard to the employment of mechanics was violated, and that the contract could not again be restored without the concurrent action of the parties.

This principle of construction has been distinctly recognized in the following cases: *Moore v. Insurance Co.*, 62 N. H. 240; *Fabyan v. Insurance Co.*, 33 N. H. 203; *Mead v. Insurance Co.*, 7 N. Y. 530; *Kyte v. Assurance Co.*, 149 Mass. 116, 21 N. E. 361; *Wilcox v. Insurance Co.*, 85 Wis. 193, 197, 55 N. W. 188; *England v. Insurance Co.*, 81 Wis. 583, 588, 51 N. W. 954; *Carey v. Insurance Co.*, 84 Wis. 80, 87, 54 N. W. 18.

In the following cases the rule is recognized that, if the nonoccupancy has terminated before the loss, the insurer will be held: *Aetna Ins. Co. v. Meyers*, 63 Ind. 238; *Alston v. Insurance Co.*, 80 N. C. 326; *Laselle v. Insurance Co.*, 43 N. J. Law, 468; *Bennett v. Insurance Co.*, 51 Conn. 504, 13 Ins. Law J. 817; *Ring v. Assurance Co.*, 145 Mass. 426, 14 N. E. 525.

tional rights? The policy plainly enough provides that, on the happening of a certain event, it shall be void. The event occurred, and the obligation of the insurance company then terminated. Unless the court has the power to create for the parties a different contract than the one they created for themselves, it can do nothing to relieve the situation; and, when the courts undertake to correct mistakes of persons by taking away their right to make contracts, the well-meant effort is likely, in the long run, to produce more evil than good. When a contract has become void for any reason, that is an end of it; and it cannot again have vitality without such affirmative action by both of the parties interested as will have the legal effect to create a new contract; and such further and supplemental action should rest on a valid consideration.

§ 146. Occupancy will be Determined in Reference to the Character of the Risk.

To determine whether a building is occupied within the meaning of the policy, reference is always necessary to the uses for which it was intended, such uses as were in the contemplation of both parties at the time the insurance was entered into. Churches and school-houses are usually closed a part of the year, during the "vacation season." This fact will be presumed to have been understood by the insurer, and that the agreement to indemnify was made in reference to circumstances which are common to property of this class. The same rule of construction will apply to farm barns, which are usually vacant during two or three months of each year.⁶

In *Herrman v. Adriatic Fire Ins. Co.*,⁷ this principle of construction was discussed in reference to its application to a summer residence. The insurance was there entered into during the season of occupation,—that is, while the plaintiff's family was living in the house; and it was urged in the argument of the case that the fact was well known to the fire insurance office that the dwelling was not to be inhabited continuously during the entire term of the policy, and that the insurance must be presumed to have been made in reference to the uses for which the property was intended. The argu-

⁶ *Caraher v. Insurance Co.*, 63 Hun, 82, 17 N. Y. Supp. 858.

⁷ 81 N. Y. 184.

ment, it must be admitted, is not without considerable plausibility and force; but Chief Justice Folger, who wrote the opinion of the court, stated with great perspicuity the distinction between this and the class of cases before mentioned. He said: "It may be that the defendant knew that it was but the summer abode of the plaintiff. Their contract was issued in the summer, when the property was in strict occupancy; and it provided for the coming fall, when that occupancy would be abandoned or modified, for the policy was not void at once or on a cessation of occupancy. That cessation must last for thirty days, and be notified to the defendant, and continue thereafter without their consent. There was opportunity for the plaintiff to keep up that indemnity, or to get other, and to the defendant to retain the risk, or to be freed from it when that occupancy was about to cease, and notice was given."

Country elevators, ice manufactories, and sawmills are distinct types of particular classes of risks, where active business operations are usual to only a part of each year. The elevator will generally be closed at midsummer, and the ice factory and sawmill in winter. But it will not be supposed that, during these dormant intervals of business, the elevator, the factory, or the mill is to be understood as vacant or unoccupied, within the meaning of an insurance policy. If the office is deserted, and the mill doors locked, it signifies no more than that the business for which these buildings were provided is experiencing its customary season of rest. If the property be abandoned, the case will, of course, be otherwise; but, if the animus revertendi is shown from the nature and circumstances of the business carried on, then it will be presumed that the risk was accepted by the insurance company, with the understanding that there would be temporary periods of idleness, and that whatever was incident and necessary to the usual management of that particular line of business would be permitted.⁸

⁸ Williams v. Insurance Co., 24 Fed. 625, 14 Ins. Law J. 708; Brighton Manuf'g Co. v. Reading Fire Ins. Co., 33 Fed. 232; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698; Hill v. Insurance Co., 99 Mich. 466, 58 N. W. 359; Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. 487; East Texas Fire Ins. Co. v. Kemper (Tex. Civ. App.) 34 S. W. 393; Keith v. Insurance Co., 10 Allen (Mass.) 228; Albion Lead Works v. Williamsburg City Fire Ins. Co., 2 Fed. 479, 9 Ins. Law J. 435; Carr v. Insurance Co., 60 N. H. 513, 13 Ins. Law J. 443.

§ 147. The Policy Conditions will be Construed Strictly in Respect to Occupancy.

When the policy specifies any particular term, as "ten days" or "thirty days," that the building may remain unoccupied without notice and consent, the indulgence is for a definite period; and, should the vacancy continue beyond the time mentioned, the insurer will not be liable for any loss occurring. If the privilege of nonoccupancy suspends the operation of the condition for 10 days, it cannot be extended by either grace or construction for 11 days.

In *Bennett v. Agricultural Ins. Co.*⁹ the condition of the policy read: "If the dwelling hereby insured shall cease to be occupied as such, the policy shall be void." The occupant moved out in the afternoon, and at 2 o'clock the next morning the house took fire, and was consumed. It was held that there could be no recovery.

The facts in this case are almost identical with those in the case of *Farmers' Ins. Co. v. Wells*,¹⁰ where the tenant removed from the house at 6 o'clock in the evening, leaving a few articles therein of no particular value. The court said: "The leaving of a barrel of bran and coal-oil can did not prevent an avoidance of the policy. The length of time elapsing after the vacation and before the fire is wholly immaterial."¹¹

§ 148. If the Property is Vacant at the Time the Insurance is Effected, with Knowledge of the Insurer, will Estoppel Apply?

It has been frequently held that when a company insures a building, knowing it to be vacant and unoccupied, it will be estopped from defending under the condition of the policy making it void on account of vacancy. While the weight of authority appears to be the

⁹ 50 Conn. 420.

¹⁰ 42 Ohio St. 519.

¹¹ *Cook v. Insurance Co.*, 70 Mo. 610, 9 Ins. Law J. 887; *Paine v. Insurance Co.*, 5 Thomp. & C. 619; *Keith v. Insurance Co.*, 10 Allen (Mass.) 228; *Ashworth v. Insurance Co.*, 112 Mass. 422; *Aetna Ins. Co. v. Meyer*, 63 Ind. 238; *Dennison v. Insurance Co.*, 52 Iowa, 457, 3 N. W. 500; *American Ins. Co. v. Padfield*, 78 Ill. 169; *Insurance Co. of North America v. Garland*, 108 Ill. 220.

other way, we think this the better rule of law, as its application tends to secure results that are less repugnant to justice. When an insurance company receives a premium with knowledge of facts that will make the policy invalid from its inception, by its own terms, it is fair to assume that something else was intended. There can be no legal presumption to support the theory that the insured had parted with the premium, except for a valuable consideration, or that the company, in receiving the premium, had contemplated a fraud on the one who had paid it. Estoppel in a case of this kind violates no principle of law, and secures substantial justice.¹²

The policy in the case of *North American Fire Ins. Co. v. Zaenger*¹³ contained a provision that it should be void if the property, by any means within the control of the insured, should become unoccupied. The declaration contained an averment that the premises had not become vacant or unoccupied by any means within the plaintiff's control, but no evidence was introduced in support of this averment. Defendant pleaded general denial, and plaintiff having read on the trial his "proofs of loss," which set forth that "there was no person living in the house at the time of the fire, the tenant having left some three weeks before," the court held that, to recover, it was necessary that the condition in regard to vacancy should be performed, or that it should be shown that the vacancy was beyond the plaintiff's control. "The condition," it said, "was in the nature of a warranty; and, having proved the house was vacant by his own affidavit, he should then have proved that such vacancy was beyond his control."

§ 149. What Constitutes Occupancy is a Question of Law —Construction of Contract.

What is meant by the word "occupation" is a question of law, but whether occupied or not, within the meaning of the law, is a ques-

¹² *Whitney v. Insurance Co.*, 9 Hun (N. Y.) 39; *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. 628; *England v. Insurance Co.*, 81 Wis. 583, 51 N. W. 954; *Devine v. Insurance Co.*, 32 Wis. 471; *Aetna Ins. Co. v. Burns*, 5 Ins. Law J. 69; *Cone v. Insurance Co.*, 60 N. Y. 619; *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *St. Paul Fire & Marine Ins. Co. v. Wells*, 89 Ill. 82; *Agricultural Ins. Co. v. Ansley*, 15 Quebec Law Rep. 256; *Short v. Insurance Co.*, 90 N. Y. 16, 12 Ins. Law J. 138.

¹³ 63 Ill. 464.

tion of fact. In cases of temporary vacancy, the courts, in applying the law, have usually had reference to the *animus revertendi*. This was not done, however, by the supreme court of Illinois in deciding the case of *Phoenix Ins. Co. v. Tucker*.¹⁴ The plaintiff there had rented his house for a term of years. Tenant was to take possession on Saturday, but a rainfall prevented his doing so. Plaintiff's family moved out on Friday, and found temporary shelter at the village a mile distant, intending to remove to Nevada in a few days. Plaintiff was at the house for a short time on both Saturday and Sunday evenings. During the night of Sunday the property burned, the fire having an incendiary origin. The court, we think, mistakenly held that the question whether the premises were occupied, within the meaning of the policy, was one for the jury. Justice Mulkey, in delivering the opinion of the court, clearly shows his doubt in regard to the correctness of the position taken. The discussion in which he engages to distinguish legal principles indicates conclusively that the problem presented was one for a learned judge, and not for an unlearned jury. We are led to infer that the case was decided more on the ground of sympathy than of law. To quote George Eliot: "Our impressions are not formed from what the judge distinctly said, but from what he has unconsciously enabled us to discern."

i

§ 150. That the Risk is Increased When the Property is Vacant, the Courts will Take Judicial Notice.

When property is vacant or unoccupied, the risk is increased. Of this fact the court will take judicial notice. The presumption, however, that a greater hazard has come to exist is not conclusive, and may be rebutted by competent testimony. This was distinctly held in *White v. Phoenix Ins. Co.*¹⁵ The policy there provided for an

¹⁴ 92 Ill. 64; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *Cummins v. Insurance Co.*, 67 N. Y. 260, reversing 5 Hun (N. Y.) 554; *Chandler v. Insurance Co.*, 88 Pa. St. 223; *Wait v. Insurance Co.*, 13 Hun (N. Y.) 371; *Woodruff v. Insurance Co.*, 83 N. Y. 133; *Poor v. Insurance Co.*, 2 Fed. 432, 9 Ins. Law J. 428; *Carr v. Insurance Co.*, 60 N. H. 513, 13 Ins. Law J. 443; *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099.

¹⁵ 83 Me. 279, 22 Atl. 167. See, also, 85 Me. 97, 26 Atl. 1049; *Mulry v. Insurance Co.*, 5 Gray (Mass.) 541; *Lyman v. Insurance Co.*, 14 Allen (Mass.)

avoidance if the premises insured should become vacant without notice to the company, and its consent indorsed on the policy. This condition of the contract was so qualified by the Revised Statutes of Maine¹⁶ that no avoidance could result on account of vacancy, unless the risk had thereby been increased. We quote from the opinion of Haskell, J.: "That vacant buildings are more exposed to danger from fire than they would be if occupied is a fact of common knowledge, to prove which, therefore, the opinion of witnesses is incompetent and unnecessary. * * * The evidence offered and excluded tended simply to prove that vacant buildings, as a rule, are more exposed to loss by fire than if occupied, inasmuch as the cost of their insurance is universally fixed at higher rates of premium. If the court failed to take judicial notice of the fact that the evidence tended to prove, its existence might have been error, for the reason stated in *Luce v. Dorchester Mut. Fire Ins. Co.*;¹⁷ but when the fact is known, and recognized as within common knowledge of all well-informed persons, it is useless to waste the time of a trial in proving it."

§ 151. *Animus Revertendi.*

The outgoing tenant still retained the key to the dwelling from which he had removed, leaving a few articles of little value, such as old papers, empty barrels, boxes, etc., and it was in evidence that the tenant had not actually inhabited the house for a period of 10 days before the fire. The agent of the company knew of the situation, and testified that he did not consider the house unoccupied. The court said that this was only the agent's opinion, and that he was clearly wrong. The tenant, while still retaining the key, was no longer living in the house. There was no *animus revertendi*, to save a forfeiture.¹⁸

In Iowa, the departing tenant had left a counter in the abandoned

329; *Luce v. Insurance Co.*, 110 Mass. 361; *Joyce v. Insurance Co.*, 45 Me. 168; *Thayer v. Insurance Co.*, 70 Me. 531; *Gamwell v. Insurance Co.*, 12 Cush. (Mass.) 167; *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103; *Lancy v. Insurance Co.*, 82 Me. 492, 20 Atl. 79, and 19 Ins. Law J. 878.

¹⁶ Chapter 49, § 20.

¹⁷ 110 Mass. 361.

¹⁸ *Home Ins. Co. v. Scales*, 71 Miss. 975, 15 South. 134

building, and the owner of the premises had permitted a saloon keeper doing business near by to store a small quantity of surplus stock. This the court thought did not prevent the building being unoccupied, within the meaning of the policy; that the storage of property of so little value as not to require the care and watchfulness which the policy holder owes to the insurer did not constitute occupancy.¹⁹

A dwelling house and barn were specifically insured in separate sums. The policy provided that there should be a forfeiture "if any change takes place in occupancy of the premises insured, or if they become vacant." This language, it was held, contemplated an avoidance only in the event that both house and barn became vacant.²⁰

§ 152. When a Condition has been Broken, and the Forfeiture Waived, the Waiver will not Continue to Relieve Later Forfeitures Arising from New Breaches of the Same Condition.

A policy, containing the usual provision that it "shall be void if the building insured be or become vacant, without consent indorsed," etc., was written to cover property that was actually vacant at the time, and known to be so by the insurer's agent. Afterwards, and during the term of the insurance, the building was occupied, and then again vacated. It was held that the vacancy at the inception of the insurance, being known to the company, would not cause an avoidance; but, when the occupation of the building took place, the condition in regard to vacancy applied, and that the later nonoccupancy relieved the insurer from payment of loss.²¹

§ 153. Application of Rule that the Contract is Entire.

Four dwellings were insured, a specific sum of \$250 being written on each. At the occurrence of a fire, two of the dwellings were inhabited, and two were not. The policy was held to be separable,

¹⁹ *Limburg v. Insurance Co.*, 90 Iowa, 709, 57 N. W. 626.

²⁰ *Worley v. Insurance Co.*, 91 Iowa, 150, 59 N. W. 16.

²¹ *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. 628.

and that the condition in regard to forfeiture, on account of vacancy, applied only to the dwellings that were unoccupied.²²

If the contract was entire, the facts above mentioned would suggest the application of a different rule. In *McQueeney v. Phoenix Ins. Co.*,²³ the policy covered two separate dwellings, located about 30 feet apart. Each was insured for a specific sum, and one was occupied, while the other was vacant. The insurer paid the loss on the building inhabited, and denied liability as to the other. The contract was held entire, and, as the company had admitted its liability under the policy by paying for one of the dwellings, it was charged also with the payment of the other. The logic of this decision is obvious. By paying for a part of the insured property, there was a waiver of the forfeiture on account of the vacancy of one of the dwellings. Had the insurer denied liability as to both dwellings, the same reasoning would have excused payment altogether.

§ 154. What Constitutes Vacancy.

It was a condition of the policy that it would become void if the insured property, without the consent of company, should remain vacant for a period of more than 10 days. The owner of the house was absent for a longer term. The evidence showed that he was engaged in hunting, but each day returned for a short time to look after the property. A servant living 200 feet away was charged with its care, and had slept there every night during the absence of the owner, until the night of the fire. Held, that the house was vacant, within the terms of the policy.²⁴

§ 155. When Insured Knows that Agent is Disobeying the Instructions of His Principal in Granting Privileges or Waiving Conditions, Such Acts will be without Legal Effect.

The insurance was to terminate if the house continued unoccupied for more than ten days at one time. At the issuing of the policy,

²² *Speagle v. Insurance Co. (Ky.)* 31 S. W. 282; *Connecticut Fire Ins. Co. v. Tilley*, 14 S. E. 851, 88 Va. 1024, and 21 Ins. Law J. 558.

²³ 52 Ark. 257, 12 S. W. 498, and 19 Ins. Law J. 305.

²⁴ *Lester v. Insurance Co. (Miss.)* 19 South. 99.

a permit was given for thirty days' vacancy. Eleven days after the expiration of this permit, the property burned. The fact that the house was not occupied was known to the local agent, but not otherwise to the company. During the thirty days of permitted vacancy, the local agent had received a letter from the general agent, instructing him to cancel the policy if the property was not occupied at the expiration of the thirty days. This letter the local agent had shown to the insured. Held, that the owner of the house had knowledge of agent's instructions, and that he had no right to rely on any promise of the agent for further indulgence.²⁵

If we sometimes fail to find harmony and concurrence of opinion expressed in the decisions concerning these difficult questions, the fact, we may suppose, refers less to the judgment of the law than to the conscience of the court. It is a hopeful sign, and one full of significance in respect to the future administration of the law, that the love of justice has grown to be a more active force in the human heart than original sin. Each case considered by the courts will have its own colorings of right and wrong. The contrariety and differentiations so often observed are affected unconsciously by these colorings. Thus, it often happens that the sympathetic heart speaks the judgment, while the legal mind ponders in silence.

§ 156. Conclusions.

A dwelling house will be unoccupied, within the meaning of the insurance policy, when no one is living in it; not, however, the temporary departure of its tenants will constitute nonoccupancy. Abandonment is necessary,—a going away without the intention to return.

A mill or manufactory will be construed to be unoccupied, although there remain on the premises the ordinary tools and machinery incident to the business, if the mill or factory has ceased to operate, and the workmen have departed, without a request to return.

When the policy, by its terms, becomes void, on account of non-occupancy of the premises insured, it will not again be revived unless by the agreement of parties. A subsequent reoccupation will not have the effect to reinstate the original promise of indemnity.

²⁵ McLeary v. Insurance Co. (Tex. Civ. App.) 32 S. W. 583.

The policy being void, all duty of performance under its terms has ended. A new obligation cannot be imposed without the affirmative action of the persons upon whom its burdens may rest.

Occupancy will always be determined by the character of the risk and the particular uses for which it is intended.

What constitutes occupancy is a question of law, but whether or not the building is occupied, within the meaning of the law, is a question of fact.

Withdrawing from many kinds of property the care and protection which are the ordinary incidents of actual occupation is an increase of the hazard. Of this fact it is the duty of the court to take judicial notice.

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CHAPTER IX.

FIXTURES.

- § 157. General Definitions.
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- 159. Fixtures Distinguished from Buildings.
- 160. When Duplicates and Extra Parts of Mill Appliances are and are not Fixtures.
- 161. Are the Engines and Cars of a Railroad Fixtures?
- 162. Particular Things that in Their Ordinary Uses are Regarded as Fixtures.
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- 164. Partitions and Other Improvements Owned by Tenants, with and without Privilege to Remove.
- 165. What are Fixtures in Manufacturing Establishments—A General Discussion.
- 166. Fixtures, as the Subject of Contract, may be Treated by the Agreement of Parties either as Fixtures, Chattels, or Real Estate.
- 167. To Determine whether the Subject of Insurance is or is not a Fixture, Reference must be had to the Circumstances of Each Particular Case.
- 168. Conclusions.

§ 157. General Definitions.

As employed to define the particular subject insured, the word “*fixture*” is frequently too general in its legal signification to express the precise intention of the parties.

There are but few words common to the insurance contract that in their ordinary meaning are more comprehensive or possess larger possibilities of involved obligation than the word “*fixture*.” Mr. Ferard, in his work on Fixtures, defines the term as “denoting those personal chattels which have been annexed to land, and which may afterwards be severed and removed by the party who has annexed them, or his personal representatives, against the will of the owner of the freehold.”

The word is modern, and, when used in the policy of insurance, does not always and necessarily import that the subject to which it refers is a part of the freehold. It may mean, and often does, any article which the tenant has the power of removing. In its larger

sense, it signifies something which is affixed to something else.¹ A very full and careful examination of the authorities reveals a good deal of confusion, and frequently a contrariety of opinion, in regard to what constitutes a fixture in particular cases. Many of the decisions where the question of fixtures has been considered refer to contests between landlord and tenant, where a somewhat less liberal rule of construction is followed than that usually applied in adjudications under the insurance contract, where, if doubt or ambiguity exists, the courts generally presume that it was the intendment of the parties that the largest measure of indemnity should be afforded. The definition given by Ferard is accepted by Ewell in his work on Fixtures, and, besides, has the support of a long line of decisions.² Within the limits of my inquiry, I do not find that any of these writers refer to the custom among insurers of designating many articles as "fixtures" that belong to the owners of the freehold; and it appears that the definition given is too narrow to compel performance on the part of the insurer, as they should do to be consistent with a faithful observance of well-known usage. In recognition of the customs of this particular business, the word "fixture" must be understood to denote something which has been a personal chattel, now annexed to the realty, and of such a character that it may be severed again without material detriment either to the chattel or to the freehold. So far as its character as a fixture is concerned, it is quite immaterial, as a subject of insurance, whether it is the property of the tenant or of the owner of the freehold. The technical and restricted meaning may be properly applied in matters affecting the relation of landlord and tenant, and in determining the rights of the reversioner or remainder-man; but the word must be understood as having a larger and different meaning in its application to the insurance policy. Fixtures are insured indifferently to both the landlord and the tenant, and in either case the same things are intended, and to this intention it is the duty of the courts to give proper legal effect.

It will be conceded that Mr. Ferard, in the rule he formulates, expresses correctly the general principle of the law. The fixture

¹ Sheen v. Rickie, 5 Mees. & W. 175.

² Gib. Fixt. 5; Grady, Fixt. 1; 2 Bouv. Inst. 162; 2 Kent, Comm. 344.

was once a chattel, and still retains, as an incident to the realty, something of its original character. When that is wholly lost, the object or thing considered has become so far identified with and merged into the realty as to be no longer a fixture. Stone piled in the field in an orderly manner or otherwise would be a chattel; but if laid in a wall, forming an inclosure or separating one field from another, the same stone becomes a fixture. It is not necessary that the wall should be laid with mortar or cement, or that the earth should be removed or disturbed to receive it. The uses for which it is intended establish its relations to the realty, and change the chattel into a fixture. And what is true of a stone wall would be equally true of a rail fence. Compost or other forms of fertilizers piled in the field are chattels, but, when scattered over the surface of the land, are converted into a fixture. Should, however, this process of distribution result in the dissipation of the fertilizer as an integral property, by becoming inseparably mixed with the soil, it will thereafter be realty only, and its character as a fixture lost. An elevator car in the hands of the manufacturer or as an article of commerce is a chattel, but when attached to a building, and adapted to use, it changed to a fixture; and, if afterwards it is separated from the building, it will again become a chattel.

These illustrations will be sufficient to indicate the nature of a fixture and the principle of law that controls in giving it a distinctive character. A fixture may be designated as a chattel that for the time being is immovable, on account of its temporary attachment to the realty, and which may not be separated without the consent of either the tenant or the owner of the freehold.

In *Teaff v. Hewitt*,³ Bartley, C. J., said: "The term 'fixture,' in its ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate, but necessary, to distinguish this class of property from movable property, possessing the nature and incidents of chattels. It is in this sense that the term is used in the greater part of the adjudicated cases."⁴

³ 1 Ohio St. 511, 524.

⁴ 2 Smith, Lead. Cas. 114; 2 Kent, Comm. 345, note A; *Elwes v. Maw*, 3 East, 57.

Mr. Ewell, in his work on Fixtures,⁵ says: "It may be observed that the word 'fixture' necessarily means only something fixed or attached to another, as distinguished from a movable,—a status of fixation or annexation,—and does not imply that such annexation is not severable."

The supreme court of Iowa was called upon to distinguish what were fixtures and what appurtenances in a photographer's business. It held that appurtenances embraced all such property as pertained to the business or room or remained there permanently, such as maps and pictures hanging on the wall, stove and carpet, furniture, machines, and stock; and that the word "fixture" referred only to the skylight, balcony, and partitions.⁶

§ 158. Fixtures and Machinery in Mills Distinguished.

The leading American case where the discussion refers to the distinction between personal property and fixtures is *Walker v. Sherman*.⁷ The subject in controversy there was the machinery in a woolen mill, which was referred to as consisting of carding, picking, shearing, and spinning machines, looms, etc., located in the factory building, but in no permanent manner attached. Cowen, J., who delivered the opinion of the court, said that a chattel, to become a fixture, "need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building. I am not prepared to deny that a machine movable in itself would become a fixture from being connected in its operation by bands, or in any other way with the permanent machinery, though it might be detached and restored to its ordinary place as easily as the chain in *Farrar v. Stackpole*.⁸ I think it would be a fixture notwithstanding."

Applying the rule which governs this decision, an insurance "on fixtures" would attach to all the machinery contained in a manufacturing establishment, whether fastened to the building or not, if connected with belts to other machines or to the line shaft, and thus embraced as a part of the operating system. In effecting an in-

⁵ Page 5.

⁷ 20 Wend. (N. Y.) 636.

⁶ *Pickerell v. Carson*, 8 Iowa, 544.

⁸ 6 Me. 154.

insurance on this class of property, the term "fixtures" would generally be found more comprehensive than the term "machinery," as it would include such subjects of insurance as foundations, steam boilers, etc., that could not with propriety be designated as machinery.

§ 159. Fixtures Distinguished from Buildings.

Such articles as mantels, chandeliers, ranges, furnaces, etc., are properly described as fixtures, for the reason that they are incidents to the realty, and cannot be removed except with the consent of the owner of the freehold. Each may be detached without serious injury to the building; and each of the articles named has a distinctly specific character, and, before its annexation to the realty, was a chattel, bought and sold in the market as such.

Weston, J., in *Farrar v. Stackpole*,⁹ said: "It is an ancient principle of law that certain things which in their nature are personal property, when attached to the realty, become a part of it as a fixture."

Gas, steam, and water pipes, and sometimes their appurtenances, while perhaps not wholly losing their character as chattels, from the manner in which they are generally placed within the walls of the building, are irremovable, and can with no better propriety be designated as fixtures than the brick and plaster which conceal them from view, and hold them permanently in the places they occupy.

In *Farrar v. Stackpole*, above referred to, the contention arose in regard to whether a certain mill chain contained in the building at the time of the sale became the property of the person who purchased the mill. The evidence on the trial of the case disclosed that the chain in dispute was attached only by a hook to another chain, which was spiked to the permanent timbers of the mill. In the opinion handed down by the court it was said: "Is it too much to say that a mill is incomplete without a chain, cable, or other substitute? * * * We are of the opinion that it ought to be regarded as appertaining to and constituting a part of the realty. * * * Windows, doors, and window shutters are often hung, but not fastened, to a building; yet they are properly part of the real estate, and pass

with it, because it is not the mere fixing or fastening which is regarded, but the use, nature, and intention."

The reasoning of this case will hardly convince the legal mind. While "use" and "intention" should always be properly regarded, they are not of sufficient consideration to change a subject distinctly personal into real estate. The operation of a sawmill without a chain, it is conceded, would be attended with inconvenience; and so, too, would the occupation of a dwelling without table or beds; and yet for this reason it will not be claimed that such common and indispensable articles of household furniture become fixtures and incidents of the realty.

§ 160. When Duplicates and Extra Parts of Mill Appliances are and are not Fixtures.

It was held in *Voorhis v. Freeman*¹⁰ that duplicates and other parts of rolling-mill machinery not in actual use were to be considered as fixtures, and passed to the purchaser as a part of the freehold. But it should be observed in this case that all of the articles which were the subject of contention had at one time and another been in use. In changing the style and character of the mill products, a temporary substitution of rolls having different form and size was required. It does not appear, therefore, that this decision proposes any enlargement of the doctrine in regard to the law of fixtures, except perhaps in the declaration that actual physical annexation is unnecessary. Had the rolls referred to been new,—that is, never in use, but kept on hand as extras to take the place of other rolls that might become unfitted for use on account of wear or accident,—a very different question would have been presented. There are many kinds of machines that are so constructed that, with the adjustment of parts as contemplated, work in different style and form will be produced. A different roll or a different knife, to secure the desired results in size or shape, is only bringing into active use a dormant member of the machine. Without these necessary adjuncts, the machine would not be complete, and would be unfitted to perform the multifarious uses for which it is designed. In respect to

¹⁰ 2 Watts & S. (Pa.) 116.

a machine of this kind, it is manifest that actual physical attachment of all its parts at one time is impossible. There is, however, a constructive annexation; and, whether the machine be a chattel or a fixture, all these separate parts temporarily out of use will be subject to the same rules of law.¹¹

Ewell says:¹² "Mill saws and leather belting, purchased by the owner of a sawmill for use therein, and which have been attached and used as a part of the mill, without any intention at the time of removing them, and which are essential parts of the mill, become parts of the realty, though temporarily severed and stored in the file room adjoining the mill."¹³

This proposition is in support of the rule before explained, but does not essentially extend its scope. Placing the saws on an arbor and the belts on pulleys constitutes them an integral part of the operating machinery of the mill and gives them a character as fixtures; and the subsequent removal, with the intention of being again restored to active use, when convenience or necessity requires, does not import a severance from the realty. An important distinction should be observed between saws, belts, and other similar articles appertaining to mills and factories, that on account of their previous use have an established relationship to the machinery, and thereby have become an incident of the realty, and the same class of articles that have never been in actual use, although bought for that purpose, and kept conveniently on the premises to replace broken or worn-out saws, belts, and other parts of the machinery, without unnecessary interruption of business. The bringing of these things onto the premises, where they may be at hand in case of urgent need, does not change their character as chattels, which will be retained until actual physical annexation has occurred.¹⁴

¹¹ Ewell, *Fixt.* 19; *Christian v. Dripps*, 28 Pa. St. 271, 278; *Hill v. Sewald*, 53 Pa. St. 271; *Patterson v. Delaware Co.*, 70 Pa. St. 381, 385; *Palmer v. Forbes*, 23 Ill. 301, 313; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609.

¹² Page 33.

¹³ *Burnside v. Twitchell*, 43 N. H. 390.

¹⁴ *Johnson v. Mehaffey*, 43 Pa. St. 308; *Burnside v. Twitchell*, *supra*.

§ 161. Are the Engines and Cars of a Railroad Fixtures?

In several important cases it has been held, and I think illogically, that the engines and cars of a railroad were fixtures. In *Farmers' Loan & Trust Co. v. Hendrickson*,¹⁵ Strong, P. J., said: "That railway cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there can be, of course, no doubt. Their wheels are fitted to the rails. They are constantly upon the rails, and, except in cases of accident or when taken off for repairs, nowhere else." Chiefly for the reasons here stated, the court reached the conclusion that the rolling stock of a railroad company was a part of the realty, in the nature of fixtures.

Judge Denio, in *Bishop v. Bishop*,¹⁶ very ably refuted the reasoning of this case. He pointed to the well-understood fact that the rolling stock of a railroad was a subject of barter in the same sense and quite to the same extent as agricultural implements; that cars of a standard gauge were seldom localized. As the means of transportation and agents of commerce, it was a common thing for cars to be taken long distances away on other roads, earning freight or mileage for their owners, and to return, perhaps, only after an absence of weeks or months. It is certainly difficult to discover any of the important distinguishing elements of a fixture in a railroad car.

§ 162. Particular Things that in Their Ordinary Uses are Regarded as Fixtures.

Mr. Ewell, in his work on Fixtures,¹⁷ has collected from adjudicated cases a large number of articles variously classified, which have been held to be fixtures, among which may be mentioned engines, boilers, furnaces, vats, partitions, soap boilers, distillery pipes, coolers, worms, stills, boilers in brickwork, retorts, cisterns, etc., shafting, belting, platform scales, shelving, millstones, machinery for running a chair factory, bowling alley, coal bins, railing and balusters for stairs, wood awning, etc.

¹⁵ 25 Barb. 484.

¹⁶ 11 N. Y. 126.

¹⁷ Pages 91-93.

In a recent decision from the supreme court of Alabama (*Capital City Ins. Co. v. Caldwell*),¹⁸ Stone, C. J., said: "The primary meaning of the word 'fixture' is 'that which is fixed or attached to something as a permanent appendage.' In law it takes a wider range, —anything fixed or attached to a building and used in connection with it is a fixture, whether it be a permanent appendage or not."

§ 163. Statues and Other Ornaments for Lawn or House.

In *Snedeker v. Warring*,¹⁹ the court was required to consider whether a certain statue passed with the realty as a fixture. The statue and pedestal, weighing between three and four tons, were sculptured from stone, and placed upon a stone foundation, located conveniently on the lawn between the house and street. It was in no manner fastened except by its own weight to the foundation upon which it rested. The court held it to be a fixture. Parker, J., who wrote the opinion of the court, in a somewhat extended discussion of the question presented, referred to Pothier, and approvingly quoted from that author the following proposition: "When, in the construction of a large vestibule or hall, niches are made, the statues attached to those niches make part of the house, for they are placed there *ad integrandam domum*. They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be anything in the vestibule without the statues."

Judge Parker declared that this application of the law appeared to him to be "in accordance with reason and justice." But it is stated elsewhere in the opinion handed down in that case that no English or American decisions had been found where the exact point of law had been settled as to whether statuary placed in a house or in grounds shall be deemed personal property or fixtures. The reasoning of the New York court in reference to the statement of the law given by Pothier appears to the writer to be not only fallacious, but extremely unfortunate. Niches, alcoves, and recesses are common to most dwellings intended for the use of persons who have the means of gratifying a cultivated taste in respect

¹⁸ 95 Ala. 77, 10 South. 355, and 21 Ins. Law J. 776. ¹⁹ 12 N. Y. 170.

to art, in both the utilities and decorations. A niche carefully designed in vestibule or hallway signifies no more than the artistic preparation for placing ornamental furniture. This may consist of statues, vases, or such other rare or curious articles as the pride or fancy of the owner may wish to display.

The writer recalls having seen, in an old American home, placed in such a niche as that described by Pothier, a statue of a remote ancestor of the owner of the property. On its head was a helmet, and it was dressed in iron mail, being the same cap and coat the grim warrior had worn while fighting for his country's liberties, 300 years before. This statue and these relics had a sentimental value to the owner, greater than that of the house in which they were placed; and would they have passed to a purchaser of the freehold without special reservations in the deed? Clearly not. A statue occupying a niche arranged as a part of the interior walls of a dwelling, and not fastened in any way to the building, is as much an article of furniture as a painting or anything else that is intended for either use or ornament.

Let us suppose a person furnishing a new house finds a place between two pilasters, forming a recess or niche of suitable dimensions for a bookcase, and, acting with regard to his convenience, procures a bookcase to be made exactly fitting the niche. Would this piece of furniture be any less a chattel than if placed against any other part of the wall? No one, I presume, will contend that such would be the case, and yet to do so would be consistent with the rule declared by Pothier. To transform furniture into fixtures, there must be annexation of an essentially permanent nature, something more than the mere form or circumstance of location.

It cannot be important whether the niche containing a statue or other article was created with special reference to that particular use, or whether it was the result of the accidental and fortuitous adjustment of structural parts, in respect to either use or ornamentation. What may have been the intention of the architect who planned, or the owner who built, the vestibule and hallway with recess or niche, is too uncertain a matter to change the legal status of this class of property in the manner indicated by the New York court in the case of *Snedeker v. Warring*.

§ 164. Partitions and Other Improvements Owned by Tenants with and without Privilege to Remove.

Among cases of the most common occurrence are those of persons who rent stores or manufacturing property for the purpose of carrying on a business that requires special appliances in the nature of fixtures. By arrangement with the owner of the buildings, these fixtures are to be attached by the tenant; and it may be stipulated in the lease that they are to remain his property, with permission to remove when his holding terminates. When this is the situation, the ownership of the fixtures will continue that of the tenant, and he may insure them as his own. But it frequently happens that, in the fitting up of a store or factory for special lines of trade or manufacturing, the fixtures are of so permanent a character, or so illy suited to other localities or for other uses, as to be of little value if removed; and, to meet this difficulty, an agreement is reached between the owner of the building and the lessee that the fixtures shall not be removed at the expiration of the lease. If it is thus arranged, the fixtures are a part of the freehold, and the tenant cannot insure them as "his own." He may have an insurable interest on account of "uses";²⁰ but the fixtures are, in legal effect, as much a part of the real estate when first attached as at any subsequent time, and are properly insured by the owner of the building. Furniture and other things not fastened to the building, or, if not entirely free, easily loosened, and without defacement of wall or floor, are not fixtures.²¹ And this rule applies as well to the implements and machinery in factories and mills.

²⁰ *Mitchell v. Insurance Co.*, 32 Iowa, 421; *Allen v. Insurance Co.*, 36 La. Ann. 767; *Fletcher v. Insurance Co.*, 18 Pick. (Mass.) 419; *Niblo v. Insurance Co.*, 1 Sandf. (N. Y.) 551; *Lawrence v. Insurance Co.*, 43 Barb. (N. Y.) 479; *Tongue v. Nutwell*, 31 Md. 302.

A partition in an hotel building held a trade fixture. *Podlech v. Phelan* (Utah) 44 Pac. 838.

A tenant held entitled to remove trade fixtures after expiration of the lease. *Id.*

²¹ *Holmes v. Insurance Co.*, 10 Metc. (Mass.) 211.

§ 165. What are Fixtures in Manufacturing Establishments—A General Discussion.

In *Teaff v. Hewitt*,²² we find a very carefully considered case, in which nearly all of the authorities available to the court were critically examined and analyzed. In the syllabus is given this definition of "fixture": "(1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; (3) the intention of the party making the annexation to make a permanent accession to the freehold."

"The machinery of a woolen factory, consisting of carding machines, spinning machines, power looms, etc., connected with the motive power of the steam engine by bands and straps, but in no wise attached to the building in which used, except by cleats or other means to confine them to their proper places for use, and subject to removal whenever convenience of business may require, without injury, are not fixtures, but chattel property."

The opinion in this case was by Bartley, C. J., and contains an exhaustive review and discussion of the whole subject of "fixtures," as the word is applied to the accessory machinery and appurtenances of factories and workshops. "Fixtures in a manufacturing establishment must be governed by the same criterion which applies to fixtures in other situations. The machinery and implements in such establishments, although useful and even essential for the business carried on, which are not permanently affixed to the ground or the structure of the building, and which can be easily removed without material injury to the building or the articles themselves, and their place supplied by other articles of a similar kind, are not fixtures, but personal property."²³

²² 1 Ohio St. 511.

²³ 1 Ohio St. 542. See, also, *Lawton v. Lawton*, 3 Atk. 14; *Dudley v. Warde*, Amb. 113; *Case Manuf'g Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493. The court here said: "It is a distinction generally recognized by those who run and operate mills, as well as by the courts, being founded on the general character of the machinery of each class, and the mode in which it is usually placed upon the premises for use. The machinery furnishing the

§ 166. Fixtures, as the Subject of Contract, may be Treated by the Agreement of Parties either as Fixtures, Chattels, or Real Estate.

It will sometimes occur that, on the narrow border ground which separates the known from the unknown, it will be very difficult to determine, from the character and circumstances of the subject

motive power is generally more closely annexed to the freehold, and of a more permanent nature, as the power furnished by it may be adapted to the propulsion of the machinery of a variety of mills without any substantial change in the motive power itself, or in the building, other than by substituting one kind of machinery for another; while the machinery that is propelled has more of the general character of personalty, is not as a rule so closely annexed to the freehold, and may be removed, and frequently is, from one mill to another, as any other article of personalty. Hence it has generally been held in this country that articles of machinery used in a factory for manufacturing purposes only attached to the building to keep them steady in their places, so that they may be more serviceable when in use, and that may be removed without any essential injury to the freehold or the articles themselves, are personal property, and do not pass by a conveyance or mortgage of the freehold."

Wolford v. Baxter, 33 Minn. 12, 21 N. W. 744. The dispute in this case referred to the question of whether certain valuable property contained in a brewery was personal or real.

"On applying these rules and tests to the case in hand, we are of opinion that the coops or casks and tubs in controversy have none of the characteristics of fixtures. They were not actually annexed to the freehold, nor were they of a nature to be deemed constructively affixed to the realty. It is true that they were well adapted to and necessary for carrying on the brewing business, to which the premises were appropriated; but this of itself is quite an immaterial element in determining the nature of an article. Many articles of a purely personal nature are useful and necessary in carrying on a particular business which can in no just sense be termed 'fixtures.' These articles were no more essential to the brewing business than were the ice tools, pitching machine, or ordinary beer kegs, or are farm machinery for the business of husbandry. It is also true that it is stipulated that these casks and tubs were constructed for the purpose of being put into and used in this brewery, and were placed there with intent that they should remain there for permanent use, and that the vaults were excavated for the special purpose of storing therein such hogsheads, and that the ice house was constructed for the special purpose of placing therein fermenting tubs in the first story, and casks in the second; but it does not appear that the vaults were excavated or the ice house built in any special

of insurance, whether it be chattel property or real estate. When these cases arise, the doubt may frequently be resolved by an inquiry as to the intention of the parties. It seems altogether a reasonable proposition that if the parties, for the purpose of insurance, treat a particular subject as personalty, it will have that character, even though it is permanently attached to the real estate. It is customary in writing on manufacturing risks to make the policy specific on machinery. In nearly all cases, in both the application and policy, the machinery is separated from the building, and treated as chattel property. The competency of the parties to do this cannot be disputed.²⁴

shape to suit these particular casks or tubs, or that the casks or tubs were constructed to fit into any particular place in the vaults or ice house. They were adapted to receive any other casks or tubs as well as these, and any other such casks or tubs would have been just as well adapted to be stored there as these. It is expressly stipulated that these tubs and hogsheads were of the same description as those in general use in breweries, and that they might be sold to other brewers for the purposes for which they were constructed. They were readily removed from the vaults and ice houses, and in fact were removed once a year or oftener outside, for the purpose of being pitched or repaired. We can see no particular difference between them and ordinary beer kegs, except that they were used exclusively inside of the vaults or ice houses, and, being larger, were somewhat more difficult to move. The intent that they should remain in this brewery for permanent use there is unimportant. Intent alone will not convert a chattel into a fixture. A farmer may take a plow or any other farm implement upon his farm, with intent to keep and use it there until it wears out, but this will not make it real estate. Moreover, it will be noted that it is not stipulated that these articles were placed in the brewery with the intent to make them a permanent accession to the freehold, but merely that they should remain there for permanent use. What has been said as to the hogsheads and tubs will, in the main, apply to the copper cooler. It was a loose, movable utensil, the same as in common use in breweries. The only ground for a distinction between this and the other articles is that, when in use, it was connected by a hose to a stationary water tank, in order to permit water to pass through it. When not in use, the hose was disconnected, and the cooler was laid away. The object and purpose of this temporary annexation was not to make the cooler a permanent accessory to the building, but for the purpose of using the article as a chattel." *Wolford v. Baxter*, supra.

See, also, *Maguire v. Park*, 140 Mass. 21, 1 N. E. 750.

²⁴ *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kan. 314; *Coleman v. Lewis*, 27 Pa. St. 291; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Hunt v. Iron Co.*, 97 Mass. 279; *Richardson v. Copeland*, 6 Gray (Mass.) 536; *Haven v.*

In *Clark v. Svea Fire Ins. Co.*,²⁵ the fixtures were placed in the building by the tenant, and were so permanently attached that removal was impossible without serious injury to the realty. The insurance was for the tenant, and the court held that he could recover. Doubtless it was as the court said,—that the right of the tenant to these fixtures was good against all the world except the landlord. That the tenant had an insurable interest is not fairly disputable, but it is also indisputable that he was not the “sole and unconditional owner”; in fact, that he was not the owner at all. Without the right of removal, his interest in the fixtures was limited to their use during the term of his lease.

§ 167. To Determine whether the Subject of Insurance is or is not a Fixture, Reference must be had to the Circumstances of Each Particular Case.

As to what are to be understood as “fixtures,” within the meaning of an insurance policy, must usually be determined by the circumstances of each particular case. Among the more important subjects of insurance, we find many things that have the character of fixtures so distinct as to afford no ground for controversy. Of such is the motive power in mills and factories, which includes engines and boilers, and all attachments immediately appertaining to the generating and application of force. In most instances this would embrace line shafting and pulleys attached, elevators in stores, factories, and apartment houses, heating apparatus (embracing the furnace or boiler, radiators, and piping), gas and water fixtures, except pipes laid in the walls or between floors (when, of course, they are part of the building). Bath-room equipments and the more permanent appliances of the kitchen and laundry, counters, shelving, and movable partitions in store and office, may be either furniture or fixtures; and whether they are one or the other

Emery, 33 N. H. 66; *Honeyman v. Thomas*, 25 Or. 539, 36 Pac. 636; *Kendall v. Hathaway*, 67 Vt. 122, 30 Atl. 859; *Winslow v. Bromich*, 54 Kan. 300, 38 Pac. 275; *Chase v. Box Co.*, 11 Wash. 377, 39 Pac. 639; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Myrick v. Bill*, 3 Dak. 284, 17 N. W. 268; *Corcoran v. Webster*, 50 Wis. 125, 6 N. W. 513.

²⁵ 102 Cal. 252, 36 Pac. 587.

will generally depend upon the nature and permanency of their relations to the building. If designed and constructed for a particular building, reference being had to the style and form of the room to which they have been specially adapted, it would show intention to affix, but would not be conclusive that they had lost their character as chattels. If they are only fastened in such a manner as to steady them on the floor or against the wall, and easily be removed and used in another store or building, they are still furniture, and should be insured as such.²⁶

§ 168. Conclusions.

“*Fixture*” signifies a chattel attached to the freehold in such manner and under such circumstances that it may afterwards be detached by the person to whom it rightfully belongs, without the consent of the owner of the freehold.

A fixture will be irrecoverably merged in the freehold when its character as a chattel is wholly gone. Unless, as a part of the freehold, its chattel identity is preserved, to the extent of making it possible by separation to resume its original character, it is no longer a fixture, but a permanent accession to the realty.

When the tenant affixes to the freehold his own chattels, under the terms of a lease which provides that he may remove them at the expiration of his holding, the ownership of the fixtures continues that of the tenant, and he may insure them as his own.

When the tenant annexes to the freehold his own personal chattels in such a manner that they take the character of fixtures, they become *eo instante* the property of the owner of the freehold, and should be insured in his name. The tenant will have an insurable interest in the nature of uses, which may be protected under a suitable form of policy.

²⁶ *Thurston v. Insurance Co.* 17 Fed. 127, 12 Ins. Law J. 699; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 202, and 16 Ins. Law J. 641; *Holmes v. Insurance Co.*, 10 Metc. (Mass.) 211; *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744; *Teaff v. Hewitt*, 1 Ohio St. 511-529.

CHAPTER X.**ADJUSTMENT.**

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§ 169. When a Fire Occurs, the Insured must Use His Best Endeavors to Protect the Property.

When a fire occurs, it is the duty of the insured to engage his best efforts to protect the property. The utmost good faith is required, both at and after the fire, in this respect. The insured can-

not be an indifferent spectator, when any act on his part can be performed to arrest the conflagration, or remove the insured property to a place of safety.¹ When goods are saved in a damaged condition, it is the insured's duty to care for them in such manner as to prevent further loss, when possible. If the damaged property be household goods, or a stock of merchandise, carried from a burning building into the street, the owner must act with diligence in providing a suitable shelter, and in doing everything reasonable for their preservation. The circumstances under which the fire occurred, and the character of the property exposed, will, of course, need to be considered, in determining the question of whether the insured has proceeded with good faith and proper celerity in the matter. It will be his duty to act always with zeal and prudence to guard the salvage against thieves, and from deterioration on account of frosts or storms, or from any other cause whatever. The insurance policy generally provides what steps it will be necessary for a claimant to pursue after a loss. When this is the case, there should be a substantial compliance.

§ 170. "Notice" and "Proofs of Loss," and "Books of Account."

If it is required that notice be given the insurer, this must be done in the manner and within the time mentioned, and proofs of loss must be prepared and furnished the company in conformity with the terms of the policy, or the company will be relieved from payment.² The insured must present his books of account for inspection of the company's adjuster, and submit to an examination under oath, when required.³ If the insured has original invoices,

¹ *Hoffman v. Insurance Co.*, 1 Rob. (N. Y.) 501, 19 Abb. Prac. (N. Y.) 325, affirming 32 N. Y. 405; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Willis v. Insurance Co.*, 79 N. C. 285; *Devlin v. Insurance Co.*, 46 U. C. Q. B. 611; *Ellsworth v. Insurance Co.*, 89 N. Y. 186, 11 Ins. Law J. 544; *Phenix Ins. Co. v. Sullivan*, 39 Kan. 449, 18 Pac. 528; *Dear v. Assurance Co.*, 41 U. C. Q. B. 553; *Phenix Ins. Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353, and 16 Ins. Law J. 58, affirming 17 Ill. App. 248.

² For discussion and citation of authorities, see chapter on "Proofs of Loss."

³ Books of account must be furnished when required. *Insurance Cos. v.*

verifying his account of stock purchased, they must be furnished, when requested; and, if the originals are destroyed or lost, a reasonable effort must be made to obtain duplicates. When the production of the books and the invoices is, by the terms of the policy, made a condition precedent, as is frequently the case, any failure on the part of the insured to perform will be at his peril. The company has stipulated for the fullest information in regard to the insured's interest in the property, the circumstances of the fire, and the extent of the loss; and, when this is withheld or refused, there can be no recovery.

§ 171. Must Produce Original or Duplicate Invoices when Required.

In *Farmers' Fire Ins. Co. of York, Pa., v. Mispelhorn*⁴ the policy provided that the insured should exhibit, at the request of the company, his books, bills of purchase, or duplicates, etc. The original invoices having been burned, the company demanded that duplicates be furnished. This the insured neglected to do. It was held that there could be no recovery. The court said: "The insured was not only bound to produce and exhibit to the company, or its agent, upon being required to do so, the bills of purchase, if within his power or control, but if they were destroyed, as he must prove, he was bound to produce duplicates thereof, if it were possible for him to do so; and it was no excuse for his failure to produce such duplicates that they were not in his possession, or at his command, at the time of the demand made. If they could have been had by application to those who could have furnished them, he was bound to procure and exhibit them as required. Compliance with this condition, if required by the company, was indispensable to the assured's right of action; and there is no answer to the ob-

Weides, 14 Wall. 375; *Langan v. Insurance Co.*, 162 Pa. St. 357, 29 Atl. 710; *Ward v. Insurance Co.*, 10 Wash. 361, 38 Pac. 1127; *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006; *Allen v. Insurance Co. (Mich.)* 64 N. W. 15; *Jube v. Insurance Co.*, 28 Barb. (N. Y.) 412; *Bonner v. Insurance Co.*, 13 Wis. 677. See authorities under section in regard to sworn examination, post, § 172.

⁴ 50 Md. 180.

jection that he had failed to comply, unless he could show either that compliance had been waived, or that performance of the condition had become impossible, without fault of his own."

The Maryland court cites in support of its decision the case of *O'Brien v. Commercial Fire Ins. Co.*,^b where the court, in construing a similar provision, said: "The intent and meaning of the clause is neither ambiguous nor obscure, and, upon the most favorable interpretation for the insured, exacts from him, upon the requisition of the insurer, duplicates of his invoices of purchase, certified by the merchants from whom the purchases were made. The condition is reasonable, and not difficult of performance, and the defendant has a right to insist upon a compliance."⁶

§ 172. Examination under Oath.

The right to require the insured to submit to an examination under oath concerning all proper subjects of inquiry is clearly stipulated for in the form of policies now in general use. The intent of this provision is to prevent fraudulent concealment, and to enable the insurer to obtain material information in regard to the origin and circumstances of the fire, the value of the property, and the claimant's interest therein. The requirement is a reasonable one, and will often, no doubt, be useful in securing important and

⁵ 63 N. Y. 108.

⁶ *Worsley v. Wood*, 6 Term R. 710; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 52, 53; *Jube v. Insurance Co.*, 28 Barb. (N. Y.) 412; *Jennings v. Insurance Co.*, 2 Denio (N. Y.) 75; *Gross v. Insurance Co.*, 22 Fed. 74, 14 Ins. Law J. 159, 160; *Bumstead v. Insurance Co.*, 12 N. Y. 93; *Phillips v. Insurance Co.*, 14 Mo. 235; *Cameron v. Insurance Co.*, 7 U. C. C. P. 234; *Cinqu Mars v. Insurance Co.*, 15 U. C. Q. B. 143; *Oshkosh Match Works v. Manchester Fire Assur. Co. (Wis.)* 66 N. W. 525 (see authorities cited at notes 3, 4 and 5); *O'Brien v. Insurance Co.*, 63 N. Y. 108; *Eggleston v. Insurance Co.*, 65 Iowa, 308, 21 N. W. 652, and 14 Ins. Law J. 365; *Jones v. Insurance Co.*, 117 N. Y. 103, 22 N. E. 578.

Demand for examination of books must be made within a reasonable time. *Hammond v. Insurance Co.*, 26 New Br. 371; *Mechanics' Fire Ins. Co. v. Nichols*, 16 N. J. Law, 410.

When noncompliance is excused. *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Perry v. Insurance Co.*, 21 L. C. Jur. 257; *Miller v. Insurance Co.*, 70 Iowa, 704, 29 N. W. 411.

truthful disclosures that would otherwise be withheld, to the injury of the insurer. When the assured refuses to be examined under oath, he will forfeit all right to recover; and, where he absents himself in such manner that he cannot be found for the purpose of an examination under oath, his absence will be regarded as equivalent to a refusal.⁷

In *Bonner v. Home Ins. Co.*,⁸ Chief Justice Dixon said: "This action should have been dismissed because prematurely commenced; for, until examination was had, the losses were not, by the terms of the policy, due and payable."

§ 173. The Insured must Answer Truthfully all Relevant Questions, and, Failing to Do So, will Forfeited All Right to Recover.

It will be at the insured's peril if his statements thus made under oath are not truthful, and given in good faith. He will lose no right under the policy by an unintentional misstatement; and, even when there are wide discrepancies shown to exist between the actual facts and the insured's statements of the same, no prejudice will arise, when such statements relate to matters of judgment or opinion, concerning which intelligent and honest persons will be likely to differ. Hence, when the question and answer refer to quantities or values which are not definitely known, the court will properly allow considerable latitude for the infirmities of judgment; but when an answer is given willfully, and with the intent to mislead and defraud, the assured will lose his right to recover.

§ 174. When False Swearing will Avoid the Policy, although No Fraud in Regard to the Insurer is Intended.

In *Clafin v. Commonwealth Ins. Co.*⁹ the supreme court of the United States has carefully considered the consequences of "false

⁷ *Bonner v. Insurance Co.*, 13 Wis. 677; *Harris v. Insurance Co.*, 35 Conn. 310; *Mueller v. Insurance Co.*, 45 Mo. 84; *Eiseman v. Insurance Co.*, 74 Iowa, 11, 36 N. W. 780, 17 Ins. Law J. 843; *Gross v. Insurance Co.*, 22 Fed. 74, 14 Ins. Law J. 158; *Phillips v. Insurance Co.*, 14 Mo. 220; *Titus v. Insurance Co.*, 81 N. Y. 410.

⁸ See note 7. ⁹ 110 U. S. 81, 3 Sup. Ct. 507, and 13 Ins. Law J. 177.

swearing" in an examination under the terms of an insurance policy, and in an elaborate opinion, written by Justice Matthews, held that the statements, having been made intentionally false, although possibly without any purpose to injure the defendants, avoided the policy.

The policy in that case provided that the insured should, if required, submit to an examination under oath. It also contained a clause that "all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims on this company under the policy." It was shown by the evidence that the insured had, a short time previous to the fire which destroyed or damaged the property covered by the policies, made certain statements to the commercial agency of Dun & Co., at St. Paul, Minn., in regard to the amount paid by him in purchase of the stock insured. This statement, it was claimed, was made for the purpose of establishing the credit of the insured at the East. The evidence on the trial tended to show that the statement made on sworn examination to the defendants' adjusters, although untrue in certain important respects, was not intended to deceive and defraud the defendant companies, but in order that the facts shown in the examination should be consistent with the statement made to R. G. Dun & Co., as before stated. We will here quote from Judge Miller's instructions to the jury. He said: "It is said here, and the point is urged with a good deal of force, that unless Mr. Murphy made these false statements, if they were false, and it is conceded that they were false, with the intent to deceive and defraud these companies, and if he made them with the intent to deceive and defraud some one else, that it is immaterial to this issue. I don't think that is the law. I don't think it was necessary, in order to avoid the policy, that the statements made by Mr. Murphy should have been solely, or even partly, with the view to get money wrongfully out of the companies. However, that is a point I wish to draw your attention to. If these statements had been wholly immaterial, that doctrine may be right. If it was a matter that the company had no right to inquire into, or interrogate him about, if he did swear falsely and intend to deceive some one else, that does not interfere with the policy; but these companies had a right to have from him the truth about every mat-

ter that was material as evidence to show whether he owned the goods or not. They had a right to have the truth from him, whatever his intention might have been,—that is, as far as the truth was material; and, so far as his statement before the notary had a tendency to mislead the companies on an important matter, it was false swearing and false testimony, within the meaning of the policy, and would avoid it. If he stated that which was intended for their action, and which would probably influence their action, then these statements were false,—then he swore falsely, within the meaning of the policy, though he did not intend to cheat them, but intended to cheat somebody else; for, without looking to his motives, the company had a right to an honest statement from him to all questions that went to show whether he was the owner of these goods or not.”

The policies in this suit were originally issued to Frances E. Barritt, and it was alleged by the defendants that the companies were misled into granting the insurance by fraudulent and grossly exaggerated valuations, and that M. received the assignment of the stock and insurance with knowledge of the fraud; that the sale to him by Mrs. Barritt was without consideration, and fraudulent; that M. therefore had never come to have any valid interest in either the stock or the insurance policies; that bad faith and deception were the basis of the entire transaction; and that the insurer had been relieved. Previous to this examination under oath, M. had presented to the companies formal proofs of loss, in which he claimed that the value of the stock at the time of the fire was over \$35,000, and that he had sustained a loss of a little less than \$27,000. The defendants alleged that the actual value of the stock before the fire did not exceed \$18,000, and that the loss and damage by reason of the fire was not more than \$5,000. From this statement it will be understood that the inquiry entered upon by the adjusters concerning the value and ownership of the stock was both relevant and material. We now quote from the opinion of Justice Matthews, of the United States supreme court. He said: “It is quite obvious that upon the issues as made in the pleadings, and actually tried, it was material to show what title and interest Murphy had, at the time of the loss, in the property insured. If he had no insurable interest, that certainly would

have been a defense. The object of the provisions, in the policies of insurance, requiring the insured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts material to their rights, to enable them to decide upon their obligations and to protect them against false claims; and every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the insured. A false answer as to any matter of fact material in the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its results, it would be a fraud effected; if it failed, it would be a fraud attempted; and if a matter were material, and the statement false, to the knowledge of the party making it, and willfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false, and willfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in the tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. 'Fraud,' said Mr. Justice Catron in *Lord v. Goddard*,¹⁰ 'means an intention to deceive.' 'Where one,' said Shipley, C. J., in *Hammatt v. Emerson*,¹¹ 'has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive.' 'If a person tells a falsehood, the natural and obvious consequence of which, if acted upon, is injury to another, that is fraud in law.'"¹²

In *Smith v. Queen Ins. Co.*,¹³ where, in his examination under oath, the assured stated that when the fire broke out he was in the county of Sunbury, and on the trial it was shown conclusively that this statement was untrue, he having left the place where the

¹⁰ 13 How. 198.

¹¹ 27 Me. 308, 326.

¹² *Foster v. Charles*, 7 Bing. 105; *Polhill v. Walter*, 3 Barn. & Adol. 114; *Sleeper v. Insurance Co.*, 56 N. H. 401; *Leach v. Insurance Co.*, 58 N. H. 245.

¹³ 1 Hann. 311.

property burned was situated, by stagecoach, at 7 o'clock p. m., and could have been only a few miles away when the fire occurred, it was held that there could be no recovery. It does not appear that the falsehood in this case was in any way material; but as it was clearly intended to deceive the insurer, possibly having in view to turn aside suspicion that the assured had any guilty connection with the origin of the fire, and if in no other respect material, the false statements thus made, under the doctrine affirmed in the last case examined, would be "false swearing," and an attempted fraud, within the meaning of the policy, and it would seem that this was the conclusion reached by the court.¹⁴

In the case of *Marion v. Great Republic Ins. Co.*¹⁵ the court held, substantially, that the false statements must not only have been made with intent to deceive the insured, but that they must also relate to some material matter. It said: "The clause in the policy in respect to false swearing is to be viewed in connection with all the other parts of the policy, and the general nature of the contract; and, so viewing it, it is obvious that it was intended thereby to require the insured to give the insurer real and reliable information as to the amount of the loss, and that a mistake or unintentional error or misstatement of an immaterial matter in the sworn statement would not avoid the policy, but the false statement must be willfully made, in respect to a material matter, and with the purpose to deceive the insurer."

The weight of authority appears to be in support of the general proposition here laid down,—that the false statement in the proof of loss, or in the sworn examination, to create a forfeiture, must be willfully made, and in regard to some material matter. As to whether the false statement, however, must be material, and to the injury of the insurer, the courts are not entirely in accord.

Judge Matthews, in *Clafin v. Insurance Co.*, supra, discussing this question of materiality, said: "It does not detract from this conclusion to suppose that the purpose of Murphy in making these false statements was not to deceive and defraud the companies, as is stated in the bill of exceptions and certificate, but for the purpose

¹⁴ *Security Ins. Co. v. Bronger*, 6 Bush (Ky.) 146; *Security Ins. Co. v. Fay*, 22 Mich. 467; *Marion v. Insurance Co.*, 35 Mo. 148, 4 Benn. Fire Ins. Cas. 741.

¹⁵ Supra.

of preventing an exposure of the false statement previously made to the commercial agency in order to enhance his credit. The meaning of that we take to be simply this: that his motive for repeating the false statements to the insurance companies was to protect his own reputation for veracity, and that he would not have made them but for that cause. But what is that, but that he was induced to make statements known to be false, intended to deceive the insurance companies, lest they might discover, and others through them, the falsity of his previous statements; in other words, that he attempted, by means of a fraud upon the face, to protect his reputation and credit? In any view, there was a fraud attempted upon the insurers, and it is not lessened because the motive that induced it was something in addition to the possible injury to them it might work. The supposition proceeds upon the very ground of the false statement of a material matter, knowingly and willfully made, with intent to deceive the defendant in error; and it is no palliation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interests in a matter not involved in the contract with them. By their contract the companies were entitled to know every matter of the circumstances of his purchase of the property insured, including the amount of the price paid, and in what manner payment was made; and false statements, willfully made, under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing, which was a breach of the condition of the policy, and constituted a bar to the recovery of the insurance."¹⁶

¹⁶ 110 U. S. 81, 3 Sup. Ct. 507. The provision for examination is valid, and should be enforced. *Gross v. Insurance Co.*, 22 Fed. 74, 14 Ins. Law J. 158.

Answer should show by whom request for examination was made, and where and when. *Aurora Fire Ins. Co v. Johnson*, 46 Ind. 315.

Notice of desire to examine assured, made to the payee of policy, held sufficient. *State Ins. Co. v. Maackens*, 38 N. J. Law, 564.

Request for examination must be distinctly made. *Id.*

Assured is bound to answer only such questions as are pertinent to the insurance, the fire, and the computation of loss. *Titus v. Insurance Co.*, 81 N. Y. 410.

Must subscribe to examination, when policy so provides. *Bonner v. Insurance Co.*, 13 Wis. 677; *Grigsby v. Insurance Co.*, 40 Mo. App. 276.

Statements made by claimant in sworn examination will not estop him.

§ 175. Statements Involving Matters of Judgment and Opinion.

Where the statement of the quantity or value of the merchandise burned has been grossly exaggerated, by reason of mistake or fault of judgment, no intention appearing to deceive or defraud, it has been frequently held that such misstatement will not discharge the insurer.¹⁷

§ 176. When False Statements, under Oath, Concerning the Amount of Loss, will Defeat Recovery, Whether Such Statements are Material or not.

In a very recent case the supreme court of Maine has distinctly stated what we understand to be the correct rule of law.¹⁸ The insurance was on buildings, and articles of personal property. In his proofs of loss was contained a schedule consisting of a large number of items of household goods and farming implements, some of which were not burned, and on others had been placed valuations very greatly exaggerated. It does not appear from the report of the case that there was any dispute but that the actual loss exceeded the amount of the insurance. The defense rested wholly on the false and exaggerated statements of the quantity and value of the property burned, without regard to the fact that the falsity of such statements did not increase the sum for which the com-

from showing that the facts were different, on trial of suit to recover. *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9.

When insured is not allowed to refer to his books while being examined, and states facts from memory, he will be permitted afterwards to review and correct his statements. *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464.

Examination under oath is no part of proofs of loss, unless so stipulated in the policy. *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465.

Insured may insist on having his attorney present during the examination. *Thomas v. Insurance Co.*, 47 Mo. App. 169.

¹⁷ *Insurance Cos. v. Weides*, 14 Wall. (U. S.) 375; *Gerhauser v. Insurance Co.*, 7 Nev. 174; *Wolf v. Insurance Co.*, 43 Barb. (N. Y.) 400; *Williams v. Insurance Co.*, 61 Me. 67.

¹⁸ *Dolloff v. Insurance Co.*, 82 Me. 266, 19 Atl. 396.

pany would be liable to make payment. The policy contained a stipulation as follows: "Any fraud, or attempt at fraud, or false swearing, on the part of the assured, shall cause a forfeiture of all claims under this policy." The plaintiff contended that, a true statement of his loss being in excess of the amount insured, the company had sustained no injury on account of the false and inflated schedule made a part of his proofs. The court said: "When the actual losses truly stated in the proof of loss exceed the whole amount of the insurance, will a knowingly and purposely false statement, on oath, in a proof of loss, or other pretended losses, destroy the plaintiff's claim for his actual losses, under such a policy as this? We cannot doubt that it will. The party stipulated that it should, it is so provided in the contract, and it is a lawful provision. The contract of insurance is one of indemnity only. The sole and lawful object of obtaining a policy of insurance is to secure simply reimbursement for actual loss. Any purpose of making a profit on the part of the assured is unlawful, and will vitiate the contract. Such being the nature of the contract, it requires good faith on the part of the assured towards the insurers. Especially is this so in the adjustment of a loss after a fire. It is impracticable for the insurers to ascertain for themselves the extent of the losses, particularly where the contents of a dwelling house and barn are insured, as in this case. The assured and his family or servants are usually the only persons who can give a true account of the losses. The insurers, therefore, usually, as in this policy, require from the assured a detailed statement, on oath, of such losses, as a necessary preliminary to the payment of the indemnity. The statute also requires this. Rev. St. c. 49, § 21. The statute and the policy both make this statement a necessary preliminary to a right of action on the policy, and they both contemplate, of course, a true statement. The demand of the statute and of the policy for such a statement is addressed to his conscience, like a bill for discovery. When, therefore, he meets this demand with knowingly false statements of losses he did not sustain, in addition to those he did sustain, he ought to lose all standing in a court of justice as to any claim under that policy. The court will not undertake for him the offensive task of separating his true from his false assertions. Fraud in any part of his formal

statement of loss taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he destroyed his actual claim by the poison of his false claim.¹⁹ We have not overlooked the case of *Shaw v. Scottish Commercial Ins. Co.*,²⁰ where Judge Lowell makes the distinction contended for by the plaintiff here. There the stipulation in the policy was, 'All fraud, or attempt at fraud, by false swearing,' etc. Here the words are, 'Any fraud, or attempt at fraud, or false swearing,' etc. It might be that there harmful fraud should appear, while here false swearing by itself is made a cause for forfeiture. But it will be seen that the United States supreme court, in *Claffin v. Insurance Co.*, *supra*, three years after Judge Lowell's opinion, considered the same question, and decided the other way; holding that false swearing alone, without its operating as a fraud upon the company, forfeited the policy. * * * It is further suggested by the plaintiff that, the buildings having been separately valued in the policy, the insurance on them is not affected by any false swearing as to the personal property. The policy of insurance, however, is an entire, single contract, to stand or fall as a whole, so far as fraud or false swearing is concerned."

§ 177. When the Insured Absents Himself so that He cannot be Subjected to a Sworn Examination, the Insurer will be Excused from Payment of Loss.

In *Harris v. Phoenix Ins. Co.*²¹ the policy contained a clause which provided, in substance, that the assured, if required, should submit to an examination under oath, and that until such examination was had or permitted the loss should not be due and payable. It appears that the defendant company did desire to make a personal examination of the assured under oath, but, notwithstanding it had put forth all reasonable efforts to find him and serve notice of its election, it had been unable to do so, for the reason

¹⁹ *Claffin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. 507; *Sleeper v. Insurance Co.*, 56 N. H. 401; *Wall v. Insurance Co.*, 51 Me. 32.

²⁰ 1 Fed. 761.

²¹ 35 Conn. 310, 4 Benn. Fire Ins. Cas. 186.

that he had purposely absented himself to avoid being thus notified by the defendant of its purpose. It was the opinion of the court that the insured having intentionally kept away to avoid performance, and thereby defeat the right of the insurer to the examination, such action was equivalent to a refusal, and that, under the terms of the policy, such examination was made a "condition precedent," and, having been defeated or obstructed by the bad faith of the assured, there could be no recovery.' Hinman, C. J., said: "It becomes important to determine whether the stipulation for his personal examination is a condition precedent to his right [of recovery] under the policy. The plaintiff insists that it is not such a condition in this case, because it does not appear that notice that a personal examination was required has ever been brought home to the assured. If this was so in consequence of the default of the defendant, there would doubtless be force in the suggestion, but the defendants have not been in fault. Having used due diligence to notify the assured that they required the performance of this stipulation, they clearly ought not to be held to have waived its performance. If the assured has intentionally absented himself so that he cannot be notified that performance of the stipulation is required, he should be held to have had notice; and if, for any cause, whether by his fault or otherwise, he cannot be notified, that may be his misfortune, or the misfortune of those claiming under or through him, but is no reason for treating as inoperative an important stipulation, which the defendant saw fit to require, and the assured to give, as a condition which was to be complied with before there could be any obligation to pay the loss."

§ 178. Fraudulent Overvaluations in Proofs of Loss Forfeited All Claim under the Policy.

In *Huchberger v. Merchants' Fire Ins. Co. of Hartford*,²² it was claimed by the defendant that plaintiff had forfeited his right to recover under the policy, on account of having stated his loss, in the formal and preliminary proofs, to be largely in excess of the actual amount shown on the trial. Judge David Davis, who heard

²² 4 Biss. 265, 268, Fed. Cas. No. 6,822.

the case, declared the rule of law, in his instructions to the jury, as follows: "If, after carefully viewing all the evidence on this subject, you are satisfied that the plaintiff intended to commit a fraud on the insurance company, you will find for the defendant. If, on the contrary, the evidence satisfies you the account was true, you will find for the plaintiff; or if the evidence satisfies you that the account of loss was not true, but mistakenly rendered, without fraud, or intent to defraud, you will find for the loss actually sustained. If you come to the latter conclusion,—that there was no intentional wrong, but that the loss was actually less than the plaintiff says,—you will find accordingly."²³

The case of *Huchberger v. Home Fire Ins. Co.* was tried before Judge Blodgett, of the United States circuit court.²⁴ The defense made was the same as that in *Huchberger v. Merchants' Fire Ins. Co.*, supra. We quote from the instructions of Judge Blodgett to the jury: "The chief defense set up to avoid the liability arising upon the admitted facts to which I have referred is that plaintiffs fraudulently presented and insisted upon a claim against the defendant for a much greater loss than they had actually sustained; and the real question in this case is whether the claim of loss made out by the plaintiffs, and demanded from the defendant, was for an amount which plaintiffs knew was greater than the loss actually sustained. If the plaintiffs knowingly, and with intent to defraud the defendant and other insurance companies who had insured their stock of goods, made up a false and exaggerated statement of the amount and value of their stock of goods in the store at the time of the fire, and destroyed or damaged, they thereby forfeit all claim against the insurers. In cases of this kind the plaintiff must come into court with clean hands. The insured is presumed to know better than any one else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law, that thus defeats all claims unless honestly made, is intended to protect insurance companies from fraud which might otherwise be perpetrated on them. It is a rule which

²³ *Dunham v. Insurance Co.*, 1 Lowell, 253, Fed. Cas. No. 4,152; *Beck v. Insurance Co.*, 23 La. Ann. 510.

²⁴ 5 Biss. 106, Fed. Cas. No. 6,821.

can do an honest man no harm. I do not mean by this that a person who has sustained a loss for which an insurance company is liable is pledged to state the exact amount of his loss in dollars and cents, with arithmetical accuracy, for that, from a variety of circumstances, is frequently impracticable; but he must disclose the whole truth, and nothing but the truth, as nearly as he can get at it at the time by reasonable effort on his part. If the evidence in this case, taken altogether, satisfies your mind that the plaintiffs did knowingly and fraudulently present a claim for a loss greater than they had sustained by the fire in question, then they cannot recover in this action."

In the case of *Weide v. Germania Ins. Co.*²⁵ the policy provided, among other things, that "all fraud, or attempted fraud, or false swearing, on the part of the assured, shall cause a forfeiture of all claims under the policy." There was a further provision in the policy that the insured should submit to a sworn examination, and produce, if required, his books of account, invoices, etc., with the stipulation that until such proofs were produced, and examinations permitted, the loss should not be payable. The court held that there would be no right of action, after a demand on the part of the insurer for a sworn examination, until it was permitted. The case was tried before both Judges Miller and Dillon, who concurred in the opinion given. We quote as follows: "It is held by the court that false swearing by the assured, either in the preliminary proofs of loss, or in the examination on oath as required by the policy, in a matter material to the rights of the company, with the intent to mislead the company, would work a forfeiture of the policy, and false statements by the assured on such examination, with intent to deceive and mislead the company relative to the terms of settlement by the assured with other companies which had insured the same property, are material, and will defeat any right to recover under the policy; that if the assured, after the fire, with intent to deceive the company, exhibited to it books of account, in which there were false entries as to the value and amount of the goods insured and claimed to have been burned, this

²⁵ 1 Dill. 441, Fed. Cas. No. 17,358.

would be a fraud, or an attempt at fraud, within the meaning of the policy, and would forfeit all right thereunder.”²⁶

In *Ferriss v. North American Fire Ins. Co.*,²⁷ Cowan, J., said, “A policy is always void, by the common law, for the least want of good faith in the assured.”

In *Britton v. Royal Ins. Co.*,²⁸ Willes, J., said: “Suppose the insured made a claim for twice the amount insured, as lost, thus seeking to put the office off its guard, and, in the result, to recover more than he is entitled to; that would be a willful fraud, and the consequence is that he could not recover anything. This is a defense quite different from that of willful arson. It gives the go-by to the origin of the fire, and it amounts to this: that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice, and also with sound policy. The law is that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith shall be maintained.”

See, also, *Lion Fire Ins. Co. v. Starr*.²⁹ The defense pleaded was an excessive valuation of the property destroyed. It was held that “the fraud, or attempted fraud, or false swearing, to cause a forfeiture of all claim under the policy, must have been willful, and not the result of inadvertence or mistake. * * * If the assured has been guilty of willful fraud, attempted fraud, or false swearing, the warranty is broken, and all benefits under the policy forfeited.”³⁰

²⁶ *Geib v. Insurance Co.*, 1 Dill. 443, Fed. Cas. No. 5,298.

²⁷ 1 Hill (N. Y.) 71; *Moore v. Insurance Co.*, 28 Grat. (Va.) 508, 6 Ins. Law J. 441; *Carter v. Boehm*, 3 Burrows, 1905; *Britton v. Insurance Co.*, 4 Fost. & F. 905.

²⁸ 4 Fost. & F. 905.

²⁹ 71 Tex. 733, 12 S. W. 45.

³⁰ The policy provided against fraud and false swearing, and, besides, had a condition that the insured must, if required, furnish duplicate invoices, the originals being lost. Compliance with this condition was demanded, and a pretended performance undertaken; but the evidence showed that the invoices produced had been so falsified as to show purchases for a much larger amount than the purchases actually made, and so far increased the apparent value of the stock as to make the loss sustained by the fire in excess

§ 179. The Contract will Generally be Construed so as to Afford the Indemnity Contemplated.

It will necessarily often occur that under the terms of a contract such as an insurance policy, containing so many general provisions, and formed without regard to particular cases, important

of the insurance. Held to be fraudulent, and, because so, to discharge the insurer. *Home Ins. Co. v. Winn*, 42 Neb. 33, 60 N. W. 575.

False statements made to adjusters by the agent of insured will not defeat recovery, unless such statements are made with the knowledge and complicity of the insured. *Metzger v. Assurance Co.* (Mich.) 63 N. W. 650.

Fraud and false swearing must be with a fraudulent intent, to avoid policy. *Tubb v. Insurance Co.* (Ala.) 17 South. 615.

Plaintiff, having been subjected to a sworn examination under the terms of the Michigan standard policy, stated, among other things, that a certain sewing machine had been burned, when in fact the machine had been removed from the house before the fire, and hidden in a woodshed or barn. Held, that false statements, if material and knowingly made, would discharge the insurer. *Knop v. Insurance Co.* (Mich.) 65 N. W. 228. See authorities cited.

Overvaluations, if made by mistake, will not avoid policy, but otherwise if made with fraudulent intent. *Marchesseau v. Insurance Co.*, 1 Rob. (La.) 438; *Wightman v. Insurance Co.*, 8 Rob. (La.) 442; *Hickman v. Insurance Co.*, 1 Ed. Sel. Cas. (N. Y.) 374.

False swearing must be done willfully, and with view to defraud. *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. St. 350.

When there has been false statement in regard to one item of the policy, it will avoid the whole. *Cashman v. Insurance Co.*, 5 Allen (N. B.) 246; *Moore v. Insurance Co.*, 28 Grat. (Va.) 508.

The false statements must be willfully and fraudulently made, to cause forfeiture. *Marion v. Insurance Co.*, 35 Mo. 148; *Phoenix Ins. Co. v. Monday*, 5 Cold. (Tenn.) 547, *Wood v. Insurance Co.*, 126 Mass. 316; *Putnam v. Insurance Co.*, 18 Blatchf. 368, 4 Fed. 753.

There will be no forfeiture, although the false statements were willfully made, unless it is shown that the insurer has been prejudiced. *Shaw v. Insurance Co.*, 1 Fed. 761.

There will be no fraud unless the false statements were willfully made, and were material. *Gerhauser v. Insurance Co.*, 7 Nev. 174; *Parker v. Insurance Co.*, 34 Wis. 363; *Little v. Insurance Co.*, 123 Mass. 380; *Gibbs v. Insurance Co.*, 13 Hun (N. Y.) 611; *Steeves v. Insurance Co.*, 4 Pugs. & B. (N. B.) 394; *Storm v. Insurance Co.*, 61 Hun, 618, 15 N. Y. Supp. 281; *O'Brien v. Insurance Co.*, 57 Hun, 589, 11 N. Y. Supp. 125.

questions will arise, after a loss, affecting the liability of the company, that had not been discussed, or even contemplated, when the agreement to insure was entered into. When this happens the intention of the parties will, of course, be determined by the language they have employed, explained, and interpreted, when obscure or ambiguous, in such a manner as to best secure the general purpose of the undertaking.³¹ The contract will be construed, so far as possible, without "reconstruction" or violating the obvious and commonly accepted use of words, as promising indemnity to the insured in respect to the subject named, limited and qualified only by such reasonable provisions as will not defeat in any substantial manner the principal purpose sought to be attained. "It is not the province of the courts to make a contract for the parties when they have failed to do so for themselves" is a declaration so often heard from the bench that it has become a familiar saying.

Parsons says that "interpretation properly precedes construction, but it does not go beyond the written text." "Construction takes place when texts to be interpreted and construed are to be reconciled with the rules of law, or with compacts or constitutions of

³¹ *Heath v. Insurance Co.*, 1 Cush. (Mass.) 257; *Merchants' Ins. Co. v. Edmond*, 17 Grat. (Va.) 138.

Where meaning is uncertain, construction will be most favorable to insured. *Merrick v. Insurance Co.*, 54 Pa. St. 277; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106.

Construction of a writing is a matter for the court: *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9.

Contracts of insurance must be construed so as to express intention of parties. *Savage v. Insurance Co.*, 52 N. Y. 504.

Conditions must not be extended by implication. *Rann v. Insurance Co.*, 59 N. Y. 387.

The rule that construction will be least favorable to company must be applied with much care, and within narrow limitations. *Foot v. Insurance Co.*, 61 N. Y. 571.

The intention of parties should be the only purpose of construction. *Cobb v. Insurance Co.*, 17 Kan. 492; *Herrman v. Insurance Co.*, 81 N. Y. 184; *Woodruff v. Insurance Co.*, 83 N. Y. 133; *Gilligan v. Insurance Co.*, 20 Hun (N. Y.) 93; *Crane v. Insurance Co.*, 3 Fed. 558; *German-American Ins. Co. v. Davis*, 131 Mass. 316, 10 Ins. Law J. 670; *Meadows v. Insurance Co.*, 62 Iowa. 387, 17 N. W. 600, and 13 Ins. Law J. 377.

superior authority, or where we reason from the aim or object of the instrument, or determine its application to cases unforeseen and unprovided for." It is the clear duty of courts to consider the intention of a contract, and to give such intention legal effect, although it may have been imperfectly or even obscurely expressed; and, in being guided to a correct conclusion, they must reason "from the aim or object of the instrument."

§ 180. Indemnity Does not Include Unrealized Profits.

There are certain underlying principles, which, if kept in mind, will materially aid the courts in a satisfactory settlement of many difficult questions. One of the most important of these, and one of the most general application in the adjustment of claims, is that indemnity does not contemplate unrealized profits. In one form or another, nearly all policies of insurance express this fact; but, whether this is done or not, the principle must be recognized as elemental and fundamental in a business where definite and accurately computable interests are subjects only that can be safely dealt with. Profits are speculative, uncertain, and intangible, frequently involving contingencies of a character so remote and complicated as to render a computation of even their approximate value impossible. Undertakings of this kind would invite crime on account of the opportunities they would offer for gain, by means of easily perpetrated frauds.³²

§ 181. When Indemnity is the Market Value.

It may be stated as a general proposition that loss will be computed on the basis of the "market value," when sales can be made at any time, and without trouble or expense. Suppose one pur-

³² *Leonarda v. Assurance Co.*, 2 Rob. (Lit.) 131; *Menzies v. Insurance Co.*, 9 Sess. Cas. (2d Series) 694; *Ellmaker's Ex'rs v. Franklin Fire Insurance Co.*, 5 Pa. St. 183; *Niblo v. Insurance Co.*, 1 Sandf. (N. Y.) 551; *Farmers' Mut. Ins. Co. v. New Holland Turnpike Co.*, 15 Atl. 563, 122 Pa. St. 37.

Under a policy covering a "builder's risk," it would seem that at least part profits on an unfinished job were allowed. *Planters' & Merchants' Ins. Co. v. Thurston*, 9 South. 268, 93 Ala. 255, and 20 Ins. Law J. 746.

chases wheat at 90 cents a bushel, and the market price afterwards advances to \$1; should then a loss occur, the owner would be entitled to receive from his insurer the market price at the time of the loss. The profit here realized is due wholly to the advance in the price of wheat before the loss. No gain comes from the destruction of property. Wheat, always being in demand at the "market price," could have been sold on the day of the fire, and the same profit of 10 cents a bushel realized. There are a few other staple commodities of prime necessity that may at any time be sold with little trouble or cost at what is known as the "market price." All other species of property are subject to different conditions, and, under the established laws of trade, the seller must seek the purchaser; and when exchanges are made there are involved trouble, expense, and risk. For these there is ordinarily compensation in the form of "profit." For illustration, we will suppose that A. owns a stock of general merchandise valued at \$25,000, which he offers to purchasers at retail for an average profit of 25 per cent. To dispose of the entire stock will perhaps require six months or more. Meanwhile there will be expense for rent, insurance, and clerk hire. There will be loss on certain portions of the stock, on account of the change of styles, and the change of seasons. The delicate and fragile articles will suffer deterioration from light, dust, and frequent handling, and there will be "moth and rust," and the labor, vexation, and risk of perhaps 5,000 separate and independent transactions; and to this must be added the use of capital. The profit, therefore, of 25 per cent. which the merchant expects to realize, is not something that inheres to his merchandise. It is not something in esse. It is in part wages, and in part compensation for the use of capital and the risk of the business; and, should a fire occur, the measure of damage would ordinarily be the cost of the goods, less any proper depreciation which they may have suffered from any cause whatever.³³

³³ *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 202, and 16 Ins. Law J. 641; *Hanover Fire Ins. Co. v. Lewis*, 23 Fla. 193, 1 South. 863; *Vance v. Forster*, 2 Craw. & D. 118, 3 Steph. N. P. 2084; *Equitable Fire Ins. Co. v. Quinn*, 11 L. C. 170; *Hoffman v. Insurance Co.*, 1 Rob. (N. Y.) 501, 19 Abb. Prac. (N. Y.) 325; *Security Ins. Co. v. Farrell*, 2 Ins. Law J. 302; *Hedger v. Insurance Co.*, 17 Fed. 498, 12 Ins. Law J. 926; *Mack v. Insurance Co.*, 2 McCrary, 211, 4 Fed. 59; *Fisher v. Insurance Co.*, 33 Fed. 544.

§ 182. When the Cost of Production is the Measure of Damages.

While in regard to a manufacturer's stock the circumstances are different, the same rule will apply. The products of the factory may be sold only at a fixed price. That price includes a profit, and until they are sold that profit is not realized. Indemnity contemplates no more than the cost of production. All insurance contracts provide that the company shall not be liable for more than the actual cash value of the property destroyed, and in many it is stipulated, in some form of words, that, if the claim shall be for loss to the stock of a manufactory, the measure of damage shall in no case exceed the cost of producing the same. A clause of this kind incorporated into the policy does not change the rule for computing the loss on this class of stocks; for, in the absence of any express agreement, there could be no other reasonable basis of computation.

In *Brady v. Northwestern Ins. Co.*³⁴ the insurance was on a frame building, which before its destruction by fire was located in the city of Detroit. On the trial of the case it was shown that an ordinance existed in that city forbidding, within the limits where the insured property had been situated, the erecting or repairing of wood structures without consent of the common council, which in this case had been asked for and refused. The defendant company signified its willingness to pay on the basis of the actual cost to restore the building to the condition in which it existed immediately before the fire. The plaintiff contended that as the building could not be replaced, on account of the prohibitory ordinance referred to, the cost to rebuild did not represent the loss or damage sustained. The theory of the plaintiff's contention was that the property insured, by reason of the fact that it was suffered to exist while the erection of other similar buildings was forbidden by local ordinance, had a commercial value largely in excess of the cost of the material and labor required for the construction of another

³⁴ 11 Mich. 425, 4 Benn. Fire Ins. Cas. 663; *Davis v. Insurance Co.* (Cal.) 43 Pac. 1115.

building of like size and character. The trial court instructed the jury that the measure of damage was the cost to repair or replace. On review of the case by the supreme court, Martin, C. J., said:

"This contract is one of indemnity against loss by fire, and the whole loss of which the fire is the actual cause is within its terms, to the extent of the indemnity promised. Much is said by judges of the proximate and remote cause of the loss, and the distinction was very elaborately discussed by counsel in the present case; but, after careful consideration, I must confess that, to my mind, the word 'proximate' is unfortunately used, and serves only to mislead the inquirer, and to produce misapprehension of the real rule of law. That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies—the operation of which could not be reasonably avoided—in motion, by which the loss is produced, is the cause to which such loss should be attributed. * * *

The fair and reasonable interpretation of the policy of insurance against loss by fire will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire, to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided.

"Under this rule, what was the plaintiff's loss in the present case? The property insured was situated within the fire limits of Detroit, within which the reconstruction or repair of any wood building injured by fire was prohibited, unless by leave of the common council. * * *

The city ordinances were in existence at the time of the last renewal of the policy. They were local laws affecting the property and the risk which the defendant assumed, and of which the latter is presumed to have had knowledge, and to have estimated in renewing the policy. Whether, therefore, in case of damage or partial loss, the common council would permit a repairing of the building, was a risk which the company took upon itself, because the loss and injury to the plaintiff might depend, in amount, upon such action of the council, while such loss and injury would be absolutely and actually the consequences of the fire, and because of the terms of the policy the company reserved the right to repair,

or not, at option; thus taking the risk of the power to repair, and of all loss which should accrue if repairing should be impossible from any cause."

To this conclusion, reached by a majority of the court, Judge Campbell filed a very able dissenting opinion; and the doctrine laid down by the Michigan court in this case was at the time, and for several years afterwards, the subject of much criticism.

While the reasoning of the learned chief justice may not be wholly satisfactory, the decision reached has been generally acquiesced in, and expresses a rule of construction that, in its application, will in most cases secure substantial justice. The theory upon which the defense was based—that a building is worth no more than what it costs—may be true, as a general proposition; but cases will often be presented when the materials and labor required for the construction of a building may be worth more than the building itself, and the rule applies to all classes of property. The corn and wheat produced by the Kansas and Dakota farmers are sold in the market without regard to what they may have cost the producer. The value of these cereals is determined wholly by other considerations than the cost of plowing, seeding, and harvesting; and so, too, under certain circumstances, a building may be worth much more or much less than the materials and labor of which it is composed. In this case of *Brady v. Northwestern Ins. Co.* we find an excellent illustration. The actual cost to produce a building of the size and character of the one destroyed may have been less than \$2,000, and yet the property may have had a "commercial value," as was claimed, of between \$1,000 and \$5,000. This would not, perhaps, have been possible, had it not been for the ordinance of the city of Detroit prohibiting the erection of similar buildings, and thereby creating a monopoly for the benefit of wood structures in existence at the time the prohibition became effective. The cost of production, as in this case, cannot determine the value, because production is impossible. The question is one wholly of uses. What would the property rent for? How much would it earn? Use, in most cases, is the best test of value. Let us take another illustration,—a case of frequent occurrence: Suppose an elevator for the storage of grain, built in the country, on a line of railroad which was subsequently changed, making it necessary to abandon the ele-

vator, or cause its removal, at great expense, to a new location. Clearly, such a building, so situated, is of a value much less than its cost of construction. Instances of a similar kind are very numerous, and show conclusively that the value of property of all kinds is affected by many circumstances wholly independent of its actual cost. We again quote from the opinion of the majority of the court: "The risk was not taken upon a mere collection of beams, boards, and other material, thrown together without purpose of special adaptation. It was upon a building for trade, situated in a particular locality, within the jurisdiction of municipal authority vested with legislative powers for special purposes, and subject to the exercise of these powers; and the parties must be regarded as contracting with full knowledge of all the facts, and the risk to which the property was thereby subjected."

The dissent of Justice Campbell related entirely to that part of the opinion sustaining the authority of the city council in creating the prohibitory ordinances.

In *Chippewa Lumber Co. v. Phenix Ins. Co.*³⁵ the action was brought to recover on a policy insuring a stock of lumber manufactured by the plaintiff. The court said: "The measure of damages fixed by the parties in their contract was not to exceed the actual cost of producing the lumber destroyed. This was not the market or cash value. The court [below] therefore adopted a standard of value in direct conflict with the agreement of the parties on this point, there can be no room for doubt. There is no difficulty in making the computation. If plaintiff bought the logs, the measure of damages would be the price paid, with interest from date of purchase, and cost of manufacturing and storage. If it purchased the stumpage, the measure would be the price of the stumpage, with interest

³⁵ 80 Mich. 116, 44 N. W. 1055.

Unless the policy, by its express terms, fixes the measure of damage at the cost of production, a different rule of estimating value will control. In *Mitchell v. Insurance Co.*, 92 Mich. 594, 52 N. W. 1017, it was held that, notwithstanding the actual cost of replacing the lumber would be much less, the plaintiff was entitled to receive payment on the basis of cash value; that is, that the cash market price at the place where the property was located should be the true measure of damage. *Mack v. Insurance Co.*, 2 McCrary, 211, 4 Fed. 59; *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. 915; *Fisher v. Insurance Co.*, 33 Fed. 544.

and the other costs added. If it owned the lands from which the logs were cut, the measure would be the fair value of the stumpage, with the other costs added, and interest."

The rule here affirmed is deeply founded in business morals. Its effect is to discourage speculation in policies of insurance. It increases the public safety, and adds to the general security of property. It prevents manufacturers from being placed in a better position by reason of their negligence or crime.

§ 183. Parties may Contract as to the Limit of Liability.

The right of the insurer to fix by contract stipulation the measure of damage, or to limit its liability, cannot well be questioned.

Field, *Law of Damages*,³⁶ says: "Both public policy and necessity seem to demand a limit to liability. The maxim, we think, considered, limits this to the approximate or immediate result of a wrong." And again the same writer says: "The right of parties to stipulate is unquestioned. The amount thus fixed will control and limit the damages recoverable."

The only difference between the application of the general rule of law to damages for breach of contract, and the obligation to pay an indemnity, is that in the latter case the parties to the contract fix their own standards of liability. Thus, they may provide for liquidated damages by naming in the contract a sum that shall be payable, without regard to whether it adequately expresses the actual damages or not, because of the breach of the contract. Such specific agreement dispenses with further inquiry or the application of general principles. It may be stated, as an undisputed proposition, that the rules of law prevail when the parties have not made the law of the contract so full and complete as to exclude the ordinary rules of law. In other words, when the contract is silent, the principles of the common law will prevail in determining the limitations of the obligations into which the contracting parties have entered.

³⁶ Section 11.

§ 184. Adjustment of Building Claims.

Losses on buildings will usually be computed on the basis of their actual cash value. This will frequently be the cost to rebuild, less any depreciation proper on account of age or condition. It will often happen, however, that the cash value of a building is less than the cost of replacing the same after deducting the difference between new and old. In such cases the actual commercial value is the true measure of damage.³⁷ It frequently happens that buildings are constructed for a particular purpose, and on account of their unfortunate location, or because the business for which they were intended has proved a failure, they become in a measure useless, and of much less value than they originally cost. This is a common experience in the growth of new towns, where "trade centers" are unexpectedly changed on account of the opening of new lines of traffic, or the location of important manufacturing enterprises. In estimating the value of this kind of property, its future prospects, as well as its present condition, must be considered. The departure of trade, and the consequent reduction of rents, may be either temporary or permanent. When a building burns under circumstances here described, there are no standards for computing the loss. If left to the wisdom of a jury, they may consider evidence relating to the original cost of the structure, its age, condition, and circumstances, and their decision as to the question of

³⁷ Insured is not entitled to have a new building in place of an old and dilapidated one. *Aetna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587.

The building insured stood on leased ground, and the owner had privilege to remove. It was in evidence at the trial that the value of the building, remaining where it was located before the fire, was \$1,000, but would be of no greater value than \$200 to remove. Fifteen days before expiration of the lease, the property burned, with an insurance of \$800. Held, that the measure of damage was the intrinsic value of the building, which must be estimated without reference to extraneous circumstances. *Laurent v. Insurance Co.*, 1 Hall (N. Y.) 45; *Brinley v. Insurance Co.*, 11 Metc. (Mass.) 195.

In the case last cited the court said, substantially, that there was no fixed rule for determining the loss when a building was totally destroyed; that in most cases the cost to rebuild would be more than a full measure of indemnity; that the question of damage would be affected by a variety of considerations, and must be determined by a jury.

value will generally be final.³⁸ A person who insures his interest as lessee can only recover for the value of the occupation or use during the unexpired period of the lease. It is in fact a matter of rents.

§ 185. Adjustments on Personal Property.

The same difficulty is experienced in arriving at a just and satisfactory estimate of values when considering personal property that is partly "out of use," such as machinery that is being put aside on account of new and better inventions. In many mills and factories, we find both the old and the new, the "relics of the past" and the "promise of the future," working side by side; one depleting capital by its wasteful and illy-adapted energies, and the other increasing it by its more skillful and economical application of force. In the event of a loss, the cost to replace the old and less practical machine is often greater than the "new invention." The old machine may be so far out of date as to be no longer manufactured, and to reproduce it would involve a large and useless expense. This, substantial indemnity does not require. A better machine can be bought for less money, and for the old one the insured is entitled to receive only its actual cash value.³⁹

§ 186. Unnecessary Expense need not be Considered in Computing the Cost of Production.

This same principle applies to all kinds of property. The frame of a house built 40 years ago in the forests of Indiana, hewn from walnut trees, then abundant and of small commercial value, adds

³⁸ *Niblo v. Insurance Co.*, 1 Sandf. (N. Y.) 551; *Mack v. Insurance Co.*, 2 McCrary, 211, 4 Fed. 59.

³⁹ In *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205, the insurance covered on reaping machines, which it was alleged were of little or no value, for the reason that they were defective in construction, and practically useless as reapers, or for any other purpose. The court held that the measure of damage was the "actual cash value." The fact that the machines were patented was of no importance. If the evidence showed that the plan of construction was defective, and the machines of no value, no loss had been sustained.

nothing to the value of that house on account of the since increased price of walnut lumber. The timber must be estimated in reference to the uses for which it is applied. If sills of oak and beams of pine are as strong and permanent as those of walnut, the computation of loss may be made on the basis of such less expensive varieties of lumber, and the insured will be indemnified. The walnut tree to-day, standing in the forest, may be of a value 10 times greater than the oak or pine; but this difference in intrinsic value is lost when the trees are hewn into beams and posts, and permanently take their place in the framework of a building. The distinction in values cannot be preserved when the lumber is appropriated permanently to the same uses. If its use were only temporary, the case would be otherwise; for, when released, the walnut would regain a commercial value commensurate with the superior uses to which it is adapted. This principle is of universal application in the economy of business. The services of a financier will be of large value in the bank or the manufactory, but worth no more than those of any ordinary laborer as a hewer of wood or a carrier of water.

§ 187. When the Insurer is not Liable for Loss Caused by Fire.

When fire is employed for the purpose of heating, generating steam, or as an agency in manufacturing, so long as it does not extend beyond the furnace, stove, or other appliance provided for its use and confinement, the insurer will not be liable for any damage resulting. For illustration, suppose, through the carelessness of servants, the dampers of a furnace well supplied with fuel should be left open, and the furnace thereby injured or destroyed. If no other loss was occasioned, the insurer would not be charged. Where lumber in a dry kiln is superheated to such an extent as to destroy the fiber of the wood, and render it useless for manufacturing purposes, it is not a loss, within the meaning of the policy, in any further or different sense than a dinner overdone to a degree of absolute loss through the carelessness of the cook. So, too, in the process of manufacturing tobacco, some portion of the stock was required to be steamed in a pan under which the fire was placed, and by reason of inattention or carelessness the tobacco became heated

to such temperature as to impair or wholly destroy its value. The insurer was not liable.

§ 188. Will There be No Liability unless There is Actual Ignition Outside of the Agencies Employed?

Mr. Wood, in his work on Insurance, states it as his conclusion that, "in order to bring such consequences within the risk, there must be actual ignition outside of the agencies, not purposely caused by the assured, and thus, as a consequence of such ignition, *dehors* the agency"; and in support of this conclusion he refers to *Austin v. Drew*.⁴⁰ The property insured under the policy in that suit was stock in a brick sugar manufactory. The building was several stories high, and in the basement (or more exactly, perhaps, on the ground floor) were the pans for boiling the syrup. These were heated with stoves especially constructed for that purpose. The sugar was dried on the upper floors, for which heat was supplied by means of a hot-air flue extending from the bottom to the top of the building, having registers opening on each floor. This flue was heated by means of a pipe connected with the stove, which served the additional purpose of carrying the smoke to the top of the building. Either by carelessness or unavoidable accident, a stoppage of the pipes occurred; smoke and heat escaping through the open registers into the sugar-drying lofts, resulting in damage, for which suit was brought to recover. Nothing was actually burned. There was no ignition, and it was held that the loss was not within the terms of the policy. Gibbs, C. J., said: "There was no more fire than always exists when the manufacture was going on. Nothing was consumed by fire. The plaintiff's loss arose from the negligent management of the machinery. The sugars were chiefly damaged by heat, and what produced that heat? Not any fire against which the company insures, but the fire for heating the pans, which continued all the time to burn without any excess. The servants forgot to open the register by which the smoke ought to have escaped, and the heat to have been tempered." Here a jury-

⁴⁰ 4 Camp. 360, 6 Taunt. 426; *Babcock v. Insurance Co.*, 6 Barb. (N. Y.) 637; *Ellis, Ins.* 273; *Steph. N. P.* 1079; 11 Pet. Abr. 18.

man arose, and interrupted the court with the declaration, "If my servant by negligence sets my house afire, and it is burned down, I expect, my lord, to be paid by the insurance office." "And so you would, sir," said the chief justice, "but then there would be a fire, whereas here there has been none. If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants, but in this case there was no fire except in the stove and flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burned, the company would have been liable. But can that be said when the fire was never at all excessive, and was always confined within proper limits? This is not a fire, within the meaning of the policy, nor a loss for which the company undertakes. They might as well be sued for the damage done to drawing-room furniture by a smoking chimney."

The statement by Mr. Wood, that there must be actual ignition, to create a liability on the part of the insurer, is not well sustained by the decisions, nor is the proposition consistent with the general practice of insurers in the settlement of loss claims. The case referred to (*Austin v. Drew*) fairly expresses the principle of construction which has been generally accepted by the courts, and by the insured and insurer, both in this country and in England. In carefully following the discussion of the several courts which have been called to consider the question in its different aspects, and in reference to a great variety of circumstances, there is observable some confusion in respect to the responsible cause of the loss or damage. While in each case it may be fire, the courts have not always clearly distinguished between the smoking lamp, that deposits its oily smut on the walls and furniture, and the overturned lamp, that sets the house on fire. Heat radiating from a hot stove may blister the paint, or even char the wainscoting, without charging the insurer; but, if the temperature is raised to the point of ignition, a fire then exists, within the meaning of the policy, and from that point the insurer's liability will begin ⁴¹ While the fire remains in the stove

⁴¹ Not limited to loss by actual ignition. *Balestracci v. Insurance Co.*, 34 La. Ann. 844.

"Direct loss or damage by fire" signifies that the fire must be the direct and immediate agency of destruction. *California Ins. Co. v. Union Compress Co.*,

or furnace, where it was purposely kindled, it is a matter of no special concern to the insurer whether the heat radiated be inadequate or excessive, unless it becomes so great that actual combustion takes place outside. When that occurs, and the burning floor or walls cause smoke and heat, which pass into other parts of the building, producing damage, the insurer will be liable, although the damage may be remote from the room or place of combustion. It is not, therefore, a question of whether the direct agency of the loss is a glowing coal, a lighted flame, or only an intense radiated heat, but rather that the parties could not have contemplated that a fire purposely kindled in the stove or furnace, while thus confined, should under any circumstances create liability on the part of the insurer. It is among the most ordinary of our experiences that claims are made for loss, and promptly paid by the underwriter, when they have been subject to no direct effects of fire, nor even unusual heat. It frequently occurs that fire on the adjoining premises will cause a severe "smoke and water" damage. While there is no ignition on the premises insured, there was ignition and active combustion elsewhere, which was the proximate cause of the damage.

In *Case v. Hartford Fire Ins. Co.*⁴² the insurance was on a stock of merchandise in a brick store, exposed by a large frame building, which afterwards took fire and was partly consumed, causing a small damage, by heat and smoke, to the stock insured. The defendant company declined to pay the loss, on the ground that no goods were burned, and that there was no direct contact of the fire. Judge Trumbull, who wrote the opinion, said, "The idea that there can be no loss by fire without actual ignition is so unreasonable to my mind that, but for the respectable authorities that have vouched for the position, I should not have thought it worthy of a moment's consideration."

It seems very clear to the writer that the Illinois court was correct in its conclusion respecting the liability of the insurer, but that it did not clearly apprehend the scope and import of the other decisions to which reference is made; that is to say, it did not regard the distinctions which the other courts have made between a

133 U. S. 387, 10 Sup. Ct. 365, and 19 Ins. Law J. 385; *Brady v. Insurance Co.*, 11 Mich. 425.

⁴² 13 Ill. 676.

fire confined to a stove or furnace where it was lighted, a smoking lamp, or a smoking chimney, and the conflagration of a burning building and its contents.

In *Greenl. Ev.*⁴³ it is said: "The proof of loss must show an actual ignition by fire; damage by heat alone, without actual ignition, not being covered by the policy." Greenleaf refers to *Austin v. Drew*⁴⁴ as his authority, and it must not be understood that he proclaims the principle as qualifying the liability of the insurer in any different sense from that of the court to which he refers.

In the case of *Hillier v. Allegheny Co. Mut. Ins. Co.*⁴⁵ the court said that the peril insured against "is fire. The instrument of destruction must be fire,"—implying that, if there were not enough units of heat to cause ignition, there was no fire, which is true. In that case the claim was made for damage to property that was located in the fourth building from where the fire was confined, and the damage was wholly from removal of the goods.

The supreme court of the United States, in *Peters v. Warren Ins. Co.*,⁴⁶ said: "Whenever the thing insured becomes by law chargeable with any expense, contribution, or loss in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss."

In *Gibbons v. German Ins. & Sav. Inst.*⁴⁷ the building was heated by steam, which, by the breaking of a pipe, escaped into a room, damaging books and furniture, and causing such intense heat as to result in charring and otherwise severely damaging the contents of the room. The court said: "Fire and heat are not one, but cause and effect. Damage by heat is not insured against, in terms, and is covered by the policy only where the misplaced fire causes it. If a fire were a moral agent, no blame could be imputed to it. It was doing its duty, and nothing more. The damage was caused by another agent, who, undertaking to transmit the beneficial influence of the fire, broke down in the task. * * * The common understanding of the word 'fire' would never include heat, short of the degree of ignition."

In *Way v. Abington Mut. Fire Ins. Co.*⁴⁸ the court confessed some

⁴³ Volume 2, § 405.

⁴⁴ 4 Camp. 360, 6 Taunt. 436.

⁴⁵ 3 Pa. St. 470.

⁴⁶ 14 Pet. 108.

⁴⁷ 30 Ill. App. 263.

⁴⁸ (Mass.) 43 N. E. 1032.

doubt as to the right for which the parties contended. Towards the end of the summer, after the stove and flue had continued unused for a long period, a small quantity of waste paper, and other light, combustible matter, was placed in the stove and lighted. This, it appears, set on fire soot in the pipe and chimney, which, falling down in a mass, stopped the draught; and the smoke, escaping into the building, caused damage to walls and furnishing, for which claim was made against the defendant company. We quote from the opinion of Knowlton, J.:

“A chimney is not intended to be used as a place in which to kindle fires, or to have fires for use or enjoyment in connection with the occupation of a building. It is intended to carry off the products of combustion. One of the products of combustion in a stove or fireplace connected with a chimney is soot, which will accumulate more or less in the chimney, and will sometimes take fire from the flame in the stove or fireplace. Chimneys are constructed with a view to guard against accidents when such fires occur. Occasional fires in a chimney, from the ignition of soot, are to be expected. Such fires are not desired. They are not maintained for any useful purpose. In a sense, they are accidental; for they are not lighted intentionally, but they start from time to time without human agency, when a large quantity of soot has accumulated, and the circumstances chance to be favorable to ignition from the fire which is maintained in the place intended for it.

“The defendant’s counsel contends that the policy was not intended to apply to a fire which is lighted and maintained for the ordinary purposes for which fires are used in buildings, and which is confined within the place that is fitted for such fires. He argues that if a stove should be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantle, or scorch valuable furniture left too near it, or injure property by its smoke which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case, if the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned for it, the insurance company would

not be liable.⁴⁹ We are not disposed to question the soundness of the general principle on which this contention is founded, and we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney incidental to the ordinary use of a stove, or whether such a fire should be held to be one for whose unexpected, injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire without human agency, in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly fire, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."

§ 189. Insurance against Loss by Fire does not Indemnify against Loss by Lightning.

In *Babcock v. Montgomery Ins. Co.*⁵⁰ the property was insured under a policy indemnifying the plaintiff against loss by fire, and the injury sustained was by lightning. No part of the property covered by the policy was consumed, or even damaged, by fire. The contention of the plaintiff was that fire, in its ordinary signification, is a constituent element of electricity, and that the mechanical or rending effects of lightning are in a large part due to the caloric properties which are always present. The court, in discussing this somewhat extraordinary proposition, declares that the burden is on the plaintiff of proving the important fact alleged, on which his right to recover would necessarily rest. It then refers

⁴⁹ *Austin v. Drew*, 4 Camp. 360, Holt, N. P. 126, and 6 Taunt, 436; *American Towing Co. v. German Fire Ins. Co.*, 74 Md. 25, 21 Atl. 553; *Scripture v. Insurance Co.*, 10 Cush. (Mass.) 356.

⁵⁰ 6 Barb. (N. Y.) 637.

to many scientific authorities relating to the phenomena of electricity, as observed and investigated by careful and competent students under a variety of circumstances, in respect to its chemical and magnetic aspects, as well as the intensity of its mechanical force. The court labors heroically with this vast problem, but reaches no satisfactory conclusion. We quote: "Excited to a high degree of intensity, its chemical effects are also manifested by fusing metals, and igniting combustible substances. These effects belong to different classes of phenomena, and are, for aught we know, entirely distinct in their character. I have not been able to find a writer, nor was our attention on the argument directed to any author, who insists that the mechanical effects of electricity are produced by its calorific properties, except M. Argo. His theory was that the explosive effects of lightning were caused by its heating properties upon water and moisture contained in the subject of the explosion. * * * Whilst it is admitted that nothing is absolutely known of the method by which heat is evolved in electric phenomena, the theory which is most generally adopted makes it the result, and not the cause, of the mechanical action."

Justice Pratt, who writes the opinion of the court, further on advances to a more general consideration of the subject, distinguishing between heat as a latent principle, with which the underwriter has no concern, and combustion, which is the "effect" to which its promises of indemnity relate. We again quote: "If it could be demonstrated that the mechanical action of lightning is the result of its calorific properties, it by no means follows that the damage is occasioned by fire. The terms 'caloric' and 'fire' admit of very different significations. One is the cause, and the other the effect. That which is termed 'caloric' seems to pervade every material substance. It may be evolved from a snowball or a piece of ice. Fire, on the other hand, is not an elementary principle, but is the effect produced by the application of heat or caloric to combustible substances. Walker says that, in the popular acceptance of the word, 'fire is the effect of combustion.' It is therefore equivalent to ignition or burning. Unless, therefore, there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable. Not that the identical property to which the damage occurred should be consumed, or even ignited, but there must be a

fire or burning, which is the proximate cause of the loss. It is immaterial how intense the heat may be. Unless it be the effect of ignition, it is not within the terms of the policy. The heat of the sun contracts timber, from which losses occur, but they would not be considered losses by fire."⁵¹

§ 190. When a Manufacturing Establishment Ceases to Operate, the Insurer will not be Liable.

It is a common and almost universal provision of the insurance policy that if the property insured be a manufacturing establishment, and runs overtime, or ceases to be operated, without the consent of the insurer, the policy shall be void. The assent of the parties to the contract is given to this provision, for the well-recognized reason that the hazard will generally be increased when work is carried on at late and unusual hours because of an extraordinary press of affairs, or when it terminates altogether. In the first case there is presumed to be special urgency and haste, which implies inadequate preparation and facilities for the performance of the extra work. With the crowding of production, too, there is likely to be less attention to fires, lights, the care of machinery, litter, and refuse matter, all of which in some manner affect the character of the hazard. On the other hand, when the establishment ceases to operate, and the work stops, there is a suggestion of an increased danger on account of the conditions of trade, or that the factory, in its appointments, may be such that it cannot be operated in competition with similar institutions with profit to its owners. Besides, too, idle and unoccupied property will often invite incendiarism and lawless interference from tramps and other evil-disposed persons. The stipulation referred to has therefore been incorporated into the policy for substantial reasons, and will be enforced by the courts.⁵²

⁵¹ Ellis, Ins. 273; Steph. N. P. 1079; 11 Pet. Abr. 18.

⁵² Policy is rendered void by a breach of the condition in regard to running overtime. *Reardon v. Insurance Co.*, 135 Mass. 121.

Held, that the condition of forfeiture if the work should stop for more than 30 days without notice and consent was not affected by a custom of insured to cease operations during dull season. *Stone v. Insurance Co.*, 27 N. E. 6, 153

In *Stone v. Insurance Co.*⁵³ the decision was under the Massachusetts statutory form of policy, which contained a clause providing for forfeiture when the property insured was a manufacturing establishment, and should cease to be operated for a period of more than thirty days, without the permission of the company. It was shown on the trial of the case that the factory had not been operated for about four months previous to the fire. There were three policies in different companies on the risk. Two of them covered on the building and machinery, and one on stock only. The companies insuring on the building and machinery were held not liable for the payment of the loss, but it was held by a divided court that the stock contained in the building could not be any part of a "manufacturing establishment," within the meaning of the policy. We quote from the opinion of C. Allen, J. He said, in respect to the policy covering on stock, that: "In the opinion of the majority of the court, it cannot be held to constitute a part of the manufacturing establishment, or to operate or be operated as such, or to cease operations, for the following reasons, stated by Mr. Justice Wm. Allen: 'The property differs from the factory or the manufacturing establishment which operates upon them, as a thing operated upon differs from that which operates, or the tools from the materials they work upon. A manufacturing establishment is an establishment for manufacturing raw materials,—that is, for operating upon materials,—and the idea of it excludes the materials upon which it operates. * * * The building and the machinery, fixtures, and appliances constitute the manufacturing establishment.'" It ap-

Mass. 475. So also where the suspension was temporary, and for purpose of making repairs. *Day v. Insurance Co.*, 70 Iowa. 710, 29 N. W. 443.

Temporary cessation, caused by epidemic, held not to be within the restriction. *Poss v. Assurance Co.*, 7 Lea (Tenn.) 704.

Stopping for short time, being out of raw material, held not "ceasing to operate the establishment." *Lebanon Mut. Ins. Co. v. Leathers* (Pa. Sup.) 8 Atl. 424, 16 Ins. Law J. 977; *American Fire Ins. Co. v. Brighton Cotton-Manuf'g Co.*, 125 Ill. 131, 17 N. E. 771.

A sawmill was idle 42 days, waiting for logs, which were expected daily. Held, that such suspension did not violate the provision against ceasing to operate. *City Planing & Shingle Mill Co. v. Merchants', M. & C. Mut. Fire Ins. Co.*, 72 Mich. 654, 40 N. W. 777.

⁵³ 153 Mass. 475, 27 N. E. 6.

pears to have been the opinion of the minority of the court, consisting of Justice C. Allen, Justice Holmes, and Justice Knowlton, that the factory having ceased to be operated for more than thirty days voided the policy insuring on stock, as well as that insuring on building and machinery. The court further says: "Neither the previous habit of the plaintiff to cease operating his factory during the dull season, nor the general custom of manufacturers of boots and shoes to do the same thing, nor the knowledge of the insurance agent that it was usual thus to stop business, can have the effect to render nugatory the express provision of the policy." ⁵⁴

§ 191. What is a Manufacturing Establishment.

A "manufacturing establishment" is a term that does not appear to have any technical signification. It may consist of buildings and machinery, or buildings without machinery, where material of one form, combined with skill and labor, is changed into other forms of greater complexity, value, and usefulness. In most instances the employment of machinery will constitute an important feature of the business, but many kinds of manufacturing are carried on without the aid of mechanical power. The magnitude of a business will be considered, as well as the agencies employed, in determining whether or not it is a "manufacturing establishment," within the

⁵⁴ Keith v. Insurance Co., 10 Allen (Mass.) 228; Kimball v. Insurance Co., 9 Allen (Mass.) 540-543; Herrman v. Insurance Co., 85 N. Y. 162.

The Pennsylvania court, in Bole v. Insurance Co., 159 Pa. St. 53, 28 Atl. 205, reviews the decisions in that state concerning the stipulation in the insurance policy that there should be a forfeiture if the mill or factory ceased to operate without notice and consent of the company. The conclusion of the court was that a manufacturing establishment is still operating, although the machinery has stopped, if the foreman is in the mill, selling machines and putting their parts together.

In Ladd v. Insurance Co., 147 N. Y. 478, 42 N. E. 197, the sawmill, insured under New York standard policy, had not been run for more than 10 consecutive days. The partner who usually operated the mill was ill. The other partner was engaged about mill, cutting wood and piling lumber. Held, that policy must have reasonable construction, and in view of the facts the mill had not ceased to operate.

meaning of the policy. Brown is a shoemaker, occupies a small room, and employs one assistant. Smith is also a shoemaker, but occupies a large room, and employs a hundred hands. Both make the same kind of goods. No mechanical power is used by either. One operates a "shoe shop," and the other a manufacturing establishment.⁵⁵

Stock and material used in manufacturing is no constituent part of the "manufacturing establishment." The term refers to buildings and to operating machinery.⁵⁶

⁵⁵ Stone v. Insurance Co., 27 N. E. 6, 153 Mass. 475.

Flour mill is a manufacturing establishment. Carlin v. Assurance Co., 57 Md. 515, 12 Ins. Law J. 388; Lawrence v. Allen, 7 How. 794; Schriefer v. Wood, 5 Blatchf. 216, Fed. Cas. No. 12,481.

The publishing of a newspaper is not manufacturing. In re Capital Pub. Co., 3 MacArthur. 412; In re Kenyon, 1 Utah, 47.

And. Law Dict. note 1, p. 655, says: "The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a 'manufactured' article, within the meaning of that term as used in the tariff laws. Thus, scouring wool does not make the resulting wool a 'manufacture of wool'; nor does cleaning and ginning cotton make the resulting cotton a 'manufacture of cotton'; nor are shells cleaned by acid, and then ground on an emery wheel, and some afterwards etched by acid, and all intended to be sold for ornaments, 'a manufacture of shells.'" Hartranft v. Wiegmann, 121 U. S. 609, 615, 7 Sup. Ct. 1240.

Pressing and baling hay is not manufacturing. Frazee v. Moffitt, 20 Blatchf. 268, 18 Fed. 584.

Cutting and storing ice is not manufacturing. The material is in no way changed or adapted to a new or different use. Hittinger v. Inhabitants of Westford, 135 Mass. 262. It was held otherwise by supreme court of Michigan in Attorney General v. Lorman, 59 Mich. 157, 26 N. W. 311.

Where ice is frozen by mechanical or chemical process, it may properly be termed "manufactured."

Animal charcoal, or bone black and bone dust, are "manufactures of bone." See Dudley v. Corporation, 100 Mass. 183.

⁵⁶ The policy covered machinery and apparatus used in the business of manufacturing leather and morocco, including boiler and engine. Held, that these chattels did not constitute a mill, and that stopping work did not create forfeiture, under the provision of the policy that liability shall terminate "if the property insured be a mill or manufactory. and shall stand idle," etc. Halpin v. Insurance Co., 120 N. Y. 73, 23 N. E. 989, 19 Ins. Law J. 455, and 43 Balt. Underwriter, 257; Stone v. Insurance Co., supra.

§ 192. Gross Negligence.

Where the policy stipulates that the insurer shall not be liable for any loss occasioned by "gross negligence," the fact of negligence may be pleaded and proved as a matter of defense; but carelessness will not relieve the company, unless of so gross a character as to amount to fraud, when the contract does not otherwise provide. On this point the law appears to be well settled by many decisions, both in this country and in England. A careful examination of the authorities discloses the reasoning of the courts to have been that fires so often proceed from carelessness of the assured, or their servants, that to apply a different rule would, in a large proportion of cases, lead to numerous and vexatious contentions in regard to the cause of fires, and practically to defeat the chief purpose of insurance.⁵⁷ Another difficulty would frequently arise, too, in determining what degree of care and watchfulness would be sufficient to prevent a forfeiture. The term is indefinite to a degree that might well appall a court seeking to apply it in connection with the conduct of the assured regarding the circumstances, immediate and remote, between which and the loss some sort of relations could be established. Was there a want of care in the construction of the building? or had servants been employed of sufficient intelligence and skill to perform their duties in a manner

⁵⁷ If there is no fraud, mere negligence will not relieve the insurer, unless the policy so stipulates. *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Pet. (U. S.) 507; *Williams v. Insurance Co.*, 31 Me. 219; *St. John v. Insurance Co.*, 1 Duer (N. Y.) 371; *Hynds v. Insurance Co.*, 16 Barb. (N. Y.) 119, affirming 11 N. Y. 554; *Gates v. Insurance Co.*, 5 N. Y. 469; *Catlin v. Insurance Co.*, 1 Sumn. 434, Fed. Cas. No. 2,522; *Mathews v. Insurance Co.*, 13 Barb. (N. Y.) 234.

Negligence, in absence of fraud or wilful misconduct, no defense. *Whitehurst v. Insurance Co.*, 6 Jones (N. C.) 352; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Henderson v. Insurance Co.*, 10 Rob. (La.) 164; *Johnson v. Insurance Co.*, 4 Allen (Mass.) 388; *Mueller v. Insurance Co.*, 45 Mo. 84; *Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219; *Cumberland Val. Mut. Protection Co. v. Douglas*, 58 Pa. St. 419; *Huckins v. Insurance Co.*, 11 Fost. (N. H.) 238.

Although negligence may have been the cause of fire, it will not prevent recovery. *Mickey v. Insurance Co.*, 35 Iowa, 174.

to secure the best protection of the property? are questions that might frequently occupy the attention of the courts.

In deciding the case of *Waters v. Merchants' Louisville Ins. Co.*,⁵⁸ Judge Story said: "There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the insured to insure himself against all losses from any perils not occasioned by his own wrong. It was well observed by Mr. Justice Bailey in delivering the opinion of the court in *Busk v. Royal Exchange Assur. Co.*,⁵⁹ after referring to the general risks in the policy, that: 'The object of the assured certainly was to protect himself against all the risks incident to a marine adventure. The underwriter being, therefore, liable prima facie by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners? If, indeed, the negligence of the master would exonerate the underwriter from responsibility in the case of a loss by fire, it would also in case of a loss by capture or perils of the sea; and it would therefore constitute a good defense in an action upon a policy to show that the captain had misconducted himself in the navigation of a ship, or that he had not resisted an enemy to the utmost of his power.'"

Judge Story then refers to the clause to which we have already adverted, and mentions the practical inconvenience of carving out such an implied exception from the general perils of a policy, and clearly indicates his opinion that such exception should not be allowed from any consideration of public policy established for the purpose of giving greater effect to the intention of the parties; saying, in substance, that, if the parties intended that the insurer should be relieved from losses arising out of the carelessness of the assured, they should so express it in the contract. Judge Story quotes approvingly the following paragraph from the opinion of Lord Tenterden in *Walker v. Maitland*:⁶⁰ "No decision can be cited where in such case [the loss by a peril of the sea] the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule. It will introduce an infinite

⁵⁸ 11 Pet. (U. S.) 213, 1 Benn. Fire Ins. Cas. 615.

⁵⁹ 2 Barn. & Ald. 79.

⁶⁰ 5 Barn. & Ald. 174.

number of questions as to the quantum of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the masthead to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy. In that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters are not liable."

Chief Justice Shaw, in *Chandler v. Worcester Mut. Fire Ins. Co.*,⁶¹ states the rule as held in the case last considered, and then proceeds to point out reasons why its general application cannot be enforced without doing violence to the "conscience of the law." He said: "The general rule unquestionably is, in the case of insurance against fire, that the carelessness and negligence of the agents and servants of the assured constitute no defense. Whether the same rule will apply equally to a case where a loss has occurred, by means of which the assured by ordinary care could have prevented, is a different question. Some of the cases countenance this distinction, but it is not necessary to decide this question. The defendant offered to prove gross misconduct on the part of the assured. The question then is whether there can be any misconduct, however gross, not amounting to a fraudulent intent to burn the building, which will deprive the assured of his right to recover. We think there may be. By an intent to burn a building, we understand a purpose manifest, and followed by some act done, tending to carry that act into effect, but not including a mere misfeasance. Suppose the assured in his own house sees the burning coals on the fireplace roll down on the wooden floor, and does not brush them up. This would be mere nonfeasance. It would not prove an intent to burn the building, but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flames begin to kindle in a small spot, which a cup of water would put out, and the insured has the water at hand, but neglects to put it on. This is mere nonfeasance, yet no one would doubt that it is culpable negligence, in violation of the maxim, '*Sic utere tuo ut alienum non lædas.*' To what extent such negligence must go in order to amount to gross

⁶¹ 3 Cush. (Mass.) 328.

misconduct, it is difficult by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that '*crassa negligentia*' was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration that although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing when the slightest care or attention would prevent a great injury manifests a willingness differing little in character from a fraudulent and criminal purpose to commit such injury."

The supposed cases which Chief Justice Shaw here presents are excellent types of many that actually occur where indifference in regard to the security of the property insured is shown in an utter want of care for its protection. Neglecting thus to act, when to do so will avert disaster, is clearly in violation of one of the principal duties which the assured has engaged to perform. It is not alone bad faith. Such misconduct amounts to a positive violation of contract obligations, and, while in the cases here considered the court declares no opinion, it pointedly intimates that the insurer would not be held under circumstances such as those described.

§ 193. Gross Carelessness will Excuse the Insurer When so Stipulated.

In *Campbell v. Monmouth Mut. Fire Ins. Co.*⁶² the policy contained a stipulation that the company would be discharged from the payment of any loss occasioned by gross negligence, and, it having been shown on the trial of the case that the fire did occur from such cause, the insurer was not held.

§ 194. Consequential Damages.

Except in cases where it is otherwise specially provided, the insurer will not be liable for remote or consequential damages, as the burning of a boiler house, causing a mill or a manufactory to suspend operation, thereby resulting in the loss of a profitable business. So, too, the destruction of a factory by fire, preventing the

⁶² 59 Me. 430.

production of goods contracted to be delivered at a stipulated time, causing the insured to pay a large sum in damages because of his failure to perform his contract, is not a loss for which the insurer is liable.⁶³

§ 195. Damages by Removal.

While the liability of the insurer for the burning of a building covered by the policy will be no more than the cost to repair or replace, if the contents insured sustain injury on account of removal the company will be chargeable with the loss; as. when goods are taken from a building on fire, during a storm, and become wet, or, from being removed in the cold, become chilled or frozen, the loss, although consequential, is one within the terms of the policy. So, too, where cattle insured were protected in sheds, and their shelter was destroyed by fire during a winter storm, and some of the cattle died on account of the exposure, and others suffered in health and flesh, it was held that the insurer was liable for the loss.⁶⁴

§ 196. Measure of Damages.

When the policy provides that the company may repair or replace property damaged or destroyed, the measure of damages can never

⁶³ Wright v. Pole, 1 Ad. & El. 621, 3 Nev. & Man. 819; Menzies v. Insurance Co., 9 Sess. Cas. (2d Series) 694; Niblo v. Insurance Co., 1 Sandf. (N. Y.) 551.

The insured cannot recover consequential damages. Ellmaker v. Insurance Co., 5 Pa. St. 183.

Insurer not responsible for interruption of business, or loss of profits. Niblo v. Insurance Co., supra.

Where the policy covered on bridge, held, that the insurer could not be charged with the loss of tolls; that consequential damages were not contemplated. Farmers' Mut. Ins. Co. v. New Holland Turnpike Co., 15 Atl. 563, 122 Pa. St. 37.

⁶⁴ When there is a conflagration on contiguous premises, and the danger imminent that it will extend to the risk, it will be the duty of the insured to use his best endeavors to protect the property by removal or otherwise; and any loss which may result from such effort, made in good faith, will be chargeable to the insurer. Case v. Insurance Co., 13 Ill. 676; Agnew v. Insurance Co., 3 Phila. (Pa.) 193.

be greater than the actual cost to restore the property within a reasonable time, if no particular time is designated.

In *Commonwealth Ins. Co. v. Sennett*⁶⁵ it was held that the fact of the property destroyed being patented is not to be regarded as enhancing its value above the actual cost of reinstating the same.

§ 197. When the Insurer and Insured will Contribute in Payment of Loss by Removal.

It is a common provision of the insurance contract that when the property covered by the policy is removed from the building where it is insured, on account of apprehended danger, contiguous or exposing property being then on fire, and it subsequently appears that the chattels insured would have been unharmed had they remained in their original location, the loss or damage occasioned by the removal shall be borne by the insurer and the insured in proportion as the amount of the insurance bears to the whole value of the property covered. Such a stipulation is based upon equitable considerations, and will be enforced by the courts. To illustrate, we will suppose that A. owns a stock of merchandise valued at \$10,000, on which he procures a policy for \$5,000. A fire occurs in adjacent premises, under circumstances where it may be reasonably apprehended that it will extend to the building where A.'s stock is situated. While the fire is extinguished before it reaches A.'s store, in view of the danger threatened ordinary prudence required the goods to be removed, and this was done to protect a mutual interest. A. and the insurance company are equally interested in saving the property, and both should share alike in the damage occasioned.

In *Peoria M. & F. Ins. Co. v. Wilson*,⁶⁶ Emmett, C. J., said: "It not unfrequently happens, however, that parties insured find it necessary or prudent, where property is in danger of being destroyed by fire, to have it removed. Indeed, it is not only their duty so to do, but in most policies it is especially provided that they shall use all possible diligence in saving and preserving the property. In all such

⁶⁵ 37 Pa. St. 205.

⁶⁶ It seems a proper subject of contract, and has been so regarded by the courts. *Peoria Marine & Fire Ins. Co. v. Wilson*, 5 Minn. 53 (Gil. 37), 4 Benn. Fire Ins. Cas. 497; *Hillier v. Insurance Co.*, 3 Pa. St. 470.

instances the damage sustained by removal should be borne by the parties according to their respective interests. This is the equitable rule, and would govern were there no contract respecting it. The interests of the parties respectively depend in such cases upon the value of the property, and the amount insured. If the property is insured for its full value, the insurer assumes all the risks; but, if insured for one-half only, the insured takes half the risk, or, in other words, insures himself to that extent. It is but reasonable, therefore, that he should bear his share of the expense incurred and damages sustained in preserving the property from destruction, and that share should correspond with the interest he has at stake. If a party, instead of taking any risk upon himself, insured to the full value of his property in different companies, the companies thus insuring would pay any loss in exact proportion to their several risks; and so, too, as to expenses and damages caused by removal. This apportionment of the damage is upon the principle that each party ought to bear the loss in proportion to his interest." The policy in this Minnesota case contained the following stipulation: "Where property insured in this company is damaged by removal from a building in which it is exposed to fire, said damage shall be borne by the insured and the insurer in such proportion as the whole sum insured bears to the whole value of the property insured." The value of the property was shown to be \$5,000, of which the defendant company insured one-half, or \$2,500. The trial court construed the foregoing clause to mean that the insured should bear one-third, and the insurer two-thirds, of the damage caused by removal, but the supreme court of Minnesota was of a different opinion. It held that the interests of the parties were equal, and that loss should be borne in the same proportion.

§ 198. Replacement of Property Damaged or Destroyed.

Where the policy contains a stipulation that in the event of a loss the insurer shall have the privilege to replace or rebuild, in lieu of the payment of the damage or loss in money, and the insurer gives notice of its intention to rebuild, the policy then becomes a contract for replacing the property, and it is immaterial whether the amount insured be less or more than the cost of restoring the

building to the condition in which it existed before the fire. When it is claimed that the reconstruction of the building has not been done within a reasonable time, or that, when completed, it is substantially of less value, on account of the use of inferior material, or the employment of careless or unskillful labor, the insured cannot bring an action to recover the amount insured, under the policy. His remedy in such case will be an action for damages on the contract to rebuild.

An interesting and instructive discussion of the question here presented will be found in the opinion of Marvin, J., in *Morrell v. Irving Fire Ins. Co.*⁶⁷ There the building was insured for \$5,000, of which the defendant had three-fifths, and the Excelsior Fire Insurance Company two-fifths. Both companies notified the plaintiff of their election to rebuild. Plans and specifications were furnished, and, the insurers having replaced the building, the plaintiff claimed that it had not been done in substantial compliance with the terms of the contract, and brought suit to recover under the policy. It was held that this could not be done. We quote from the syllabus of the case: "After the election and notice, a contract to rebuild existed between the parties, of such a kind that the contractor had received the entire consideration in advance. If this contract is not fulfilled by the insurer, he is liable for the damages sustained by the non-fulfillment of the contract, which may be more or less than the amount insured. The action, consequently, should have been brought to recover for a breach of contract."⁶⁸

When the insurer has rebuilt, he will have no claim against the insured for the difference between the value of the new building and the one burned, although the latter may have been old and in bad condition when destroyed. If, however, the policy contains a distinct provision for such allowance, the case undoubtedly would be otherwise. There is no reason why the parties should not, by proper contract stipulation, provide that the insurer, in case of rebuilding,

⁶⁷ 33 N. Y. 429, 4 Benn. Fire Ins. Cas. 766.

⁶⁸ *Beals v. Insurance Co.*, 36 N. Y. 522, affirming 36 Barb. 614; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Brown v. Insurance Co.*, 1 El. & El. 853; *Fire Ass'n v. Rosenthal*, 108 Pa. St. 474, 1 Atl. 303, and 15 Ins. Law. J. 658; *Good v. Insurance Co.*, 43 Ohio St. 394, 2 N. E. 420, and 15 Ins. Law J. 3.

should receive from the insured an equitable compensation for the difference between the new and the old building. Such agreement would be consistent with the principles of indemnity, which form the basis of the entire undertaking; but in the absence of any such special agreement the insurer cannot claim to be reimbursed in part for his expenditures because the new building is of greater value than the old one.

This question was before the court in the case of *Brinley v. National Ins. Co.*⁶⁹ We quote from the opinion of Wild, J.: "At the trial the defendant contended that as a new store of similar dimensions and plans with the old one, built of new material, would be worth more than the old one, a deduction ought to be made from the estimated cost of a new store, for the difference in value between the old store and the new one, analogous to the deductions of new for old in the adjustment of losses on marine policies. This claim for deductions was not sustained by the judge at the trial, and we are not aware of any authority or principle by which it can be supported. * * * The plaintiff's counsel contends that the actual loss is to be ascertained by the expense of restoring the property, without any deductions for the difference of value between the new and old materials, and so the rule is laid down by Professor Greenleaf; but the only adjudicated case he cites, which has any distinct bearing on the question, is that of *Vance v. Foster*,⁷⁰ in which Mr. Baron Pennefather laid down a very different rule. He says⁷¹ that 'the jury are to say what state of repairs the machinery was in, what it would cost to replace it by new machinery, and how much better, if at all, the mill' in which the machinery was placed 'would be with the new machinery than it was at the time of the fire, and the difference is to be deducted from the entire expense of placing there such new machinery.' This rule, in all cases where the cost of repair is one of the elements by which the jury are to estimate the actual loss, seems to be founded on the principle of justice, as it will give to the assured a full indemnity, and no more, to which he is entitled by the contract; but, by the rule contended for by the plaintiff's counsel, the assured, in most cases, would recover more than an indemnity, and much more when

⁶⁹ 11 Metc. (Mass.) 195. ⁷⁰ 1 Ir. Cir. Cas. 47-51. ⁷¹ 3 Steph. N. P. 2084.

the building insured is dilapidated and much out of repair. Such rule is not supported by any principle of justice, nor by the authority of any adjudged case. It is founded on an erroneous construction of the contract. It supposes that the insurers are bound to repair the building, or to pay the expenses of the repairs, but no such obligation is imposed upon them by the policy. They have the privilege to make the requisite repairs, if they see fit to protect themselves against the recovery of excessive damages, or for any other reason; but, if they elect not to make the repairs, they are liable only to pay a fair indemnity for the loss. But, whatever the rule may be when the building insured is partially injured by the peril insured against, it has no application to cases like the present, where the building is totally destroyed, and is to be replaced by a new one. The rule of damages in cases on marine policies would not apply to a case where the ship had been totally destroyed. In the present case the building was erected upon a different plan, so that the cost of a new building could not be certainly ascertained, if the rule laid down in *Vance v. Foster* were applied. The jury must ascertain by the estimate and opinion of witnesses the amount of the expense of a new building, and they must estimate the value of the old building, in order to ascertain the difference, if any there be, between the new and the old. We can perceive no use in requiring this double estimate, for, where the plaintiff is only entitled to recover the value of the building destroyed, the estimate of the cost of a new building is useless."

In *Parker v. Eagle Fire Ins. Co.*⁷² the insurer claimed its option to reinstate the property as provided for in the policy, but the insured insisted that the repairs were not properly made, and brought suit to recover for the full damage sustained by the fire, without deductions for the labor and material on account of the partial reinstatement. The trial judge instructed the jury "that the defendant having undertaken to make good the plaintiff's loss by replacing, rebuilding, and repairing, if they had not fully done this, so as to make the building substantially as good as before the fire, no deductions should be made from the damage originally done to the plaintiff's building by fire for any repairs made by the defendant;

⁷² 9 Gray (Mass.) 152, 4 Benn. Fire Ins. Cas. 226.

and, if the defendant had not fully made good the plaintiff's loss by their repairs, then the jury should give the same damages to the plaintiff as if no repairs had been made." The supreme court refused to sanction this principle of construction, and stated a rule which in most cases will no doubt be found equitable in its application. Thomas, J., said: "The labor done and materials furnished in building, and in repair of building, become incorporated with and constitute additions to the real estate of the owner. If, therefore, the repairs were made with the purpose of complying with the by-laws in good faith, and were of substantial benefit to the plaintiff, the defendant should have the advantage of them, though not so perfect as fully to make good the plaintiff's loss. The difference between the value of the building as repaired, in fact, and what the value would have been had the repairs been full and complete, is the measure of damage in the case."

§ 199. When Repairs are not Properly Made, the Insured's Remedy is by an Action at Law on the Contract to Repair.

Where an insurance company elects to build, and proceeds to do so, but uses material that is inferior and unsatisfactory, and performs the labor in a negligent and unskillful manner, a court of equity will not take jurisdiction to enforce a provision of the policy giving the insurer the right to rebuild. In such case the insured must find his remedy in an action at law for damages on account of the improper and incomplete performance of the contract.

§ 200. The Insurer may Restore the Property, although Loss is Payable to a Mortgagee.

If the loss is payable to a third person, as creditor or mortgagee, the insurer may nevertheless insist on its right to rebuild or replace. The right of the mortgagee to recover payment in money is subordinate to the right of the company to reinstate the property. This question has been frequently before the courts, and, except in *Foster v. Equitable Mut. Fire Ins. Co.*⁷³ we find no dissent to the proposition above stated.

⁷³ 2 Gray (Mass.) 216.

In *Heilman v. Westchester Fire Ins. Co.*,⁷⁴ Church, C. J., said: "It has been settled in this court that in such case the contract to insure becomes superseded by the building contract; that the action is upon the contract to rebuild, and not upon the policy, and that the company, having exercised the option, is bound, as upon an original contract, to build, with the consideration paid in advance; and that neither the amount of loss, nor the amount of insurance, is controlling upon the question of the amount of recovery, in an action upon such a contract. *Morrell v. Irving Fire Ins. Co.*⁷⁵ Looking at the terms of the contract in the light of these adjudications, it seems logically to follow that the legal title to the cause of action, which is on the building contract, is in the plaintiff, and not in the mortgagee. The payment contemplated to be made to the mortgagee was a payment in money, as provided in the policy, within sixty days after proofs of loss. This agreement was qualified by the other provision referred to, making it optional to rebuild, which, when exercised, superseded the agreement to pay, and, in the language of Judge Denio, rendered the alternative obligation to pay 'obsolete and inapplicable.' Indeed, the terms of the contract seem decisive on this point. The agreement to pay the loss is accompanied by an express proviso rendering it not obligatory if notice is given."

Another leading authority on this branch of our discussion is *Brown v. Royal Ins. Co.*⁷⁶

In *Stamps v. Commercial Ins. Co.*⁷⁷ it was held that, when the company had declared its election to rebuild, its right became abso-

⁷⁴ 75 N. Y. 7, 8 Ins. Law J. 53.

⁷⁵ 33 N. Y. 429; *Beals v. Insurance Co.*, 36 N. Y. 522.

⁷⁶ *Brown v. Insurance Co.*, 1 El. & El. 856; *Stamps v. Insurance Co.*, 77 N. C. 209.

⁷⁷ *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 124.

The right of election to repair or rebuild is absolute, if made within the terms of the policy; and, such election once made by the insurer, the work of repairing or reconstruction must proceed in good faith, and without unreasonable delay. If the insured obstructs the insurer in the proper and efficient exercise of his right to restore the property, he will forfeit all benefits to be derived from the policy. The insured must furnish plans and specifications, if the policy so requires, and must permit the insurer, at all proper times, to enter the premises with such workmen and material as may be necessary

lute, as against either creditor or mortgagee. The contract to insure being one of indemnity, the replacing of the property destroyed protects all parties.

§ 201. When the Cost of Rebuilding or Repairing is Less than the Insurance, the Insurer will not be Excused from the Payment of Future Losses on the Balance of the Policy.

In *Trull v. Roxbury Mut. Fire Ins. Co.*⁷⁸ there was a total destruction of the property, and the company rebuilt at a cost less than the amount of insurance; and it was held that the policy was not canceled, but that the insurer was still liable, to the extent of the unexhausted portion of the policy, for subsequent losses.⁷⁹

for the advancement and completion of the repairs or reconstruction. The insurer having elected to rebuild, he must do so, without regard to the fact that the cost may exceed the sum insured. If the building burned was a frame, and located inside the fire limits, where the erection of wood structures are prohibited by a municipal ordinance, then the replacement must be with such material as will be permitted. *Fire Ass'n v. Rosenthal*, 108 Pa. St. 474, 1 Atl. 303, and 15 Ins. Law J. 658.

When several companies are concerned in a loss on building, and by mutual understanding each elects to rebuild, contribution for the necessary disbursements on account of labor and material will, of course, be in proportion as the insurance with each company bears to the total insurance; but should any of the companies which have given notice of their election to rebuild subsequently settle with the assured, and refuse contribution to the building fund, the remaining companies must proceed with performance, under their election, as though all companies were contributory. *Good v. Insurance Co.*, 43 Ohio St. 394, 2 N. E. 420, and 15 Ins. Law J. 3. This construction is sustained by the authority of only a single decision. It seems repugnant to the basic principles of law and business. The rule of contribution, which in the payment of the loss has been stipulated for, cannot be changed without an infringement of vested rights. In a case of this kind, each of the insurers has acted in reference to the election of the other, and if the insured afterwards settles with one or more of such companies, and permits the election to be rescinded, the insured should then be held, in performing the rebuilding engagement, to contribution in place of such company or companies.

⁷⁸ 3 Cush. (Mass.) 263.

⁷⁹ *Haskins v. Insurance Co.*, 5 Gray (Mass.) 432; *Ryder v. Insurance Co.*, 52 Barb. (N. Y.) 447; *Times Fire Assur. Co. v. Hawke*, 5 Hurl. & N. 935; *Bersche v. Insurance Co.*, 31 Mo. 546; *Aetna Ins. Co. v. Phelps*, 27 Ill. 71.

§ 202. An Election to Rebuild is Irrevocable.

It has been seen that the courts recognize with great unanimity the right of the insurer to reinstate the property burned, when it is so stipulated in the policy; and when such right is denied, or the company is obstructed in exercising it, the insured will forfeit all claim under his policy. An election to rebuild is irrevocable, and should the insurer afterwards, within a reasonable time, fail to perform, it will be liable for any damage which the insured may sustain because of such failure.

In *Fire Ass'n v. Rosenthal*⁸⁰ the company signified its intention to rebuild, and undertook to do so, but was prevented by the authorities. The building burned was frame, and located within certain limits where the erection of wood structures was prohibited by municipal ordinance. The court held that the insurer was not excused from performance; that, if it could not rebuild of wood, it should use such material as was permitted by municipal regulations, notwithstanding to do so would involve a larger cost, and the insured having completed the building abandoned by the insurance company on account of the interference of the authorities, using such material as was allowed, the insurer was liable for the cost of construction, and for any loss on account of rents by reason of the delay. When the insurer decides to rebuild, and so notifies the insured, and demands plans and specifications, unless they are furnished the insured cannot subsequently complain that the building erected is unlike the one destroyed. In order that it may avail itself of the right to rebuild, the insurer must give notice of its election within the time provided in the policy.⁸¹

⁸⁰ 108 Pa. St. 474, 1 Atl. 303.

⁸¹ See *Harrington v. Insurance Co.*, 5 N. Y. St. Rep. 417; *Anderson v. Assurance Co.*, 55 Law J. Q. B. 146; *Alleyn v. Insurance Co.*, 11 L. C. 394; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 202; *Collins v. Insurance Co.*, 1 Chi. Leg. News, 202, Fed. Cas. No. 3,009; *Good v. Insurance Co.*, 43 Ohio St. 394, 2 N. E. 420.

§ 203. The Insurer will Have His Election to Rebuild or Replace, although Policy is Made Payable to a Third Person.

When, by indorsement or otherwise, a third person is made the payee of a policy, the election will still continue with the insurer to rebuild or replace the property burned. The payee acquires no right, except to have such money as will become due and payable to the insured; and, should the insurer exercise its paramount right to restore the property, there will be nothing due to the insured, and nothing for him to receive.⁸²

If there is a failure to perform, after electing to rebuild, the insurer will be liable for the cost of replacement, and, if there has been partial performance, the measure of damages will be the cost to finish the work begun.⁸³

§ 204. When the Insurer is Entitled to Contribution from Co-Insurers.

Where the policy does not provide for contribution in case there is other insurance on the same property, the insured may enforce his claim for loss against either company on the risk, to the extent of its policy, and the company thus elected may demand and enforce contribution from its co-insuring companies; but in order to avoid this circuitry, and to limit the liability of each insurer to its just share of the loss, it has become the universal practice of insurance companies to incorporate into their policies a stipulation that they shall not be liable for any greater proportion of the loss than the sum insured under its particular policy bears to the whole sum insured. Under a contract of this form, when the loss is ascertained to be less than the total insurance it must be apportioned among the different insurers, and the insured will look to each company for payment of the sum for which it may be severally liable; and should either of

⁸² Tolman v. Insurance Co., 1 Cush. (Mass.) 73; Quarles v. Clayton, 87 Tenn. 308, 10 S. W. 505.

⁸³ Morrell v. Insurance Co., 33 N. Y. 429; Parker v. Insurance Co., 9 Gray (Mass.) 152; American Cent. Ins. Co. v. McLanathan, 11 Kan. 533.

the companies be insolvent, or excused from payment by reason of any fault of the insured, the extent of the liability of the so-insurers will not be affected. Policies frequently contain a clause limiting the liability of the insurer to a fixed proportion of the loss, or of the value of the property insured, as two-thirds or three-fourths. For illustration, suppose property valued at the time of the fire at \$6,000 is insured under a policy for \$5,000, containing a "three-fourths loss clause," and the loss is ascertained to be \$5,000; the liability of the company would be three-fourths of \$5,000, or \$3,750. Or suppose the policy contains a three-fourths value clause; the liability of the insurer would in that case be three-fourths of \$6,000, or \$4,500. Should the property be covered by two policies, each for \$3,000, one with a clause limiting its liability to three-fourths of the value of the property, and the other promising protection to the full amount of \$3,000, the last company must first pay the loss in excess of three-fourths of the value of the property, \$500, and what remains of the sum insured under the policy after payment of the \$500 would then be liable to contribute with the \$3,000 other insurance to pay the balance of the loss, \$4,500. We would then have available insurance of \$5,500 to pay the remainder of the loss.

Of this the policy with three-fourths value clause would pay.....	\$2,454 55
And the policy without three-fourths value clause would pay.....	2,045 45
	<hr/>
	\$4,500 00
Add amount first paid by unlimited policy.....	500 00
	<hr/>
Amount of loss.....	\$5,000 00

§ 205. Apportionment of Nonconcurrent Policies.

On the occurrence of a loss, it will frequently be found that the several policies on the risk do not cover concurrently, and the apportionment of the loss among the different insurers is often a task of much difficulty. We will again illustrate: A. owns a stock of merchandise valued at \$20,000, divided as follows:

Dry goods valued.....	\$10,000
Boots and shoes valued.....	5,000
Groceries and hardware valued.....	5,000
	<hr/>
	\$20,000

The stock is insured as follows:

On general stock.....	\$8,000	
On boots and shoes and dry goods.....	6,000	
On groceries and hardware.....	3,000	
	<hr/>	\$17,000

A loss occurs of \$13,000, distributed as follows:

Dry goods.....	\$5,000	
Boots and shoes.....	4,000	
Groceries and hardware.....	4,000	
	<hr/>	\$13,000

Having in mind the fact that all insurance is predicated on values, it would appear that the most equitable method of applying the general policy would be in the proportion that the value of each class of stock, respectively, bears to the whole value, if a reformation of the blanket policy is admitted. Under the rule indicated, \$4,000 of the general policy in the example given must be held to apply on dry goods, \$2,000 on boots and shoes, and \$2,000 on groceries and hardware; and, on the same basis, the blanket on boots and shoes and dry goods would run \$4,000 on dry goods, and \$2,000 on boots and shoes. Thus apportioned, the whole insurance would now be distributed thus:

\$8,000 on dry goods, on valuation of.....	\$10,000
\$4,000 on boots and shoes, on valuation of.....	5,000
\$5,000 on groceries and hardware, on valuation of.....	5,000

Under this distribution, the amount of insurance on the respective items would provide for the given loss. But if the amount of loss on dry goods, for example, were total, namely, \$10,000, it becomes apparent that this rule of apportioning the blanket insurance will fail to indemnify the assured, and therefore some other method must be found; or, following up this basis of value rule, a reapportionment of the residue of the blanket insurance may be resorted to, until the assured shall be paid his whole loss. Thus, if the loss on dry goods were \$10,000, there would be a deficit of \$2,000 to make up. The blanket insurance in the supposed case has paid the loss up to the sum of \$8,000 in the ratio of values, leaving \$6,000 of blanket insurance still untaxed. Of this the general blanket would appear to be fairly chargeable with two-thirds of the deficit, under the rule, and the blanket on boots and shoes and dry goods with one-third of the deficit.

We are well aware that strong objections may be urged against this rule in many cases, although the principle on which it rests would seem to be unassailable. Yet, on the other hand, much may be said in favor of the dictum that "the blanket policy must pay," chiefly because the company issuing such policy has neglected to preserve its rights as it might have done, and as has been done by the company having the specific policy; and there are reasons why it should not be allowed to claim any benefits, because of the incidental fact that it finds a specific policy on some portion of the property where, in the absence of such other insurance, it would properly be obliged to follow and pay the whole loss, up to the full amount for which it is written.

This principle of apportionment was held in *Blake v. Exchange Mut. Ins. Co. of Philadelphia*.⁸⁴ The general policy, for the purpose of contribution with specific insurance, should be made to apply equally to every part of the subject insured. But, as we have here pointed out, from this rule there must be occasional departures. The specific policy cannot, of course, be extended, under any circumstances, to protect other subjects than those to which it applies; and it will sometimes happen, as we have shown, that the general policy, by this system of contribution, will be so far depleted as to be inadequate to furnish the assured the complete indemnity he is fairly entitled to receive. Under the specific policy, a salvage may be secured, while the general policy may be exhausted, and some portion of the loss remain unpaid. When the plan of apportionment here proposed, in its practical application, deprives the insured of his full measure of protection, resort is frequently had to the less equitable method of first applying the general policy to the payment of any loss not covered by the specific insurance, and then requiring the remainder of the policy to contribute in payment of the loss on specific subjects. The application of this rule of apportionment will frequently result unjustly to the company having the general policy, is wanting in the essential elements of proportion, and has nothing to recommend it except the necessity of providing some manner of distribution that will secure a payment of the entire loss. This method of apportionment is arbitrary,

⁸⁴ 12 Gray (Mass.) 265; *Benn. Fire Ins. Cas.* 206.

and subject to the objection that it must always rest upon the consent of the parties.

Nearly half a century ago, Judge Cowen, in the case of *Howard Ins. Co. of New York v. Scribner*,⁸⁵ wrestled unsuccessfully with the difficult questions presented by nonconcurrent policies. The plaintiff company there insured \$1,000 on fixtures and \$3,000 on stock, while the Aetna Company insured \$5,000 on fixtures and stock. The perplexity of the court will be appreciated by those who have had a similar experience. Cowen, J., said: "We must here regard the first as, in effect, two separate policies, insuring \$1,000 on the fixtures, and \$3,000 on the stock. Then, to warrant contribution, we want two separate policies, or one insuring separate sums on each. The assured, however, took only one policy, insuring an entire sum in one parcel. The subject was therefore different. In the first it was separate; in the second, compound; and such a difference may as well be extended to 50 as to only 2 subjects. The several subjects are found to be substantially different when an effort is made to effect contribution. The counsel for both parties agree that in order to do so the \$5,000 must be divided into two parts; one being applied to the fixtures, and the other to the stock. It is not denied that the division must be entirely arbitrary, and the different methods proposed by the parties best accord with their respective interests. Neither has cited any case where such a thing has been done, nor mentioned any principle by which we should be authorized thus to modify the contracts of parties. Something like it was, I perceive, once attempted by a private hand, and with about the same success as has attended the efforts of counsel here."

Then, as now, no learning of the courts, no ingenuity of the counsel, can explain that which is essentially inexplicable. Cases are sometimes presented where the complication defies human understanding. When this occurs,—when reason is baffled and mathematics fail,—arbitrary action becomes a necessity. The knot we cannot untie must be cut.

⁸⁵ 5 Hill (N. Y.) 298.

§ 206. Contribution When Policies are General and Specific.

In Page v. Sun Ins. Office⁸⁶ the court was required to apportion the loss among nonconcurrent policies. The property insured consisted of lumber located in what were designated as "East" and "West" yards. The total value of lumber covered was \$59,095.52. Of this, \$42,368.46 was piled in the west yard, and \$16,727.06 in the east yard. There were four specific policies, of \$2,500 each, covering on the west yard, and policies aggregating \$40,000 covering generally on all the lumber in both yards. The loss was confined to the west yard, and was adjusted at \$30,982.82. There was a printed clause in each of the policies expressing the stipulation that "this company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance * * * covering such property." The defendant in this action had issued one of the specific policies before mentioned, insuring only the lumber in the west yard, and the contention of plaintiff was that the defendant could claim contribution from the general policies only in proportion as the value of the lumber in the west yard should bear to the total value of all the lumber insured. Nelson, District Judge, said: "Under this clause in the Minnesota standard policy, which is the contract governing the case, the limitation of liability is for a proportionate part of the whole insurance covering the property, and the stipulation exempts the defendant from any greater liability than a part of the loss to be measured by the whole amount insured. This rule, it seems to me, must be applied, whether the other insurance is by specific or compound policies. There is no intimation in the clause that compound or floating policies, covering the same and other property, are not to be considered as a part of the whole insurance covering such property."

While the rule of contribution contended for by the defendants may have the merit of being more equitable, its application, as the court suggests, would be repugnant to the stipulations of the pol-

⁸⁶ 64 Fed. 194; *Cromie v. Insurance Co.*, 15 B. Mon. (Ky.) 432; *Angelrodt v. Insurance Co.*, 31 Mo. 593.

icy. Had there been no specific insurance on the west yard, no question could have arisen as to the liability of the general policies; and as the contracts failed to express any limiting or qualifying clause in case of other insurance, except to provide for pro rata contribution, it is quite clear that the conclusion reached by the court was the correct one.

When the insurance is distributed among several companies, and the loss is greater than the total sum of all the policies, there is no method of apportionment that will diminish the liability of any individual insurer. When the loss exceeds the aggregate insurance, no company on the risk shall pay less, by reason of any plan of constructive or theoretical contribution, than such company would be liable to pay if it were the sole insurer.⁸⁷

§ 207. Contribution When Any of the Co-Insuring Policies are Invalid, or Where Any Companies Insuring on the Risk have Become Insolvent.

When the policy stipulates, as is usually the case, that the company insuring shall not be liable for any greater proportion of the loss than the amount named in its policy shall bear to the whole insurance on the property, "whether valid or not," in the apportionment of a loss all other policies on the risk must be treated as contributing insurance, unless they are written to protect different interests, as that of the owner and mortgagee or leasehold. In such case, while the subject is the same, the interest is separate and distinct, and a policy issued for the sole benefit of one party, procured and paid for by him, cannot be held to contribution in payment of a loss to another. The reason of this exception to the rule above stated will be apparent when the personal nature of the contract is considered,—that it is always the person, and not the property, that is insured. The legal effect of the stipulation mentioned is to provide against a contingency that is always liable to arise, concerning the validity of other policies, and the solvency of other companies on the risk. Without it, trouble-

⁸⁷ Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28; Phillips v. Insurance Co., 7 Phila. (Pa.) 673; Pencil v. Insurance Co., 28 Pac. 1031, 3 Wash. St. 485.

some questions will frequently be presented, under the terms of the policies of co-insuring companies, which will need to be settled before the extent of their own liability can be ascertained. To avoid the expense, delay, and vexation which would sometimes result from being involved in these controversies between the claimants and their co-insurers, companies have generally stipulated that all policies on the risk shall be subject to contribution in the apportionment of a loss, "whether valid or not," and the courts recognize the propriety of such a stipulation.

In the case of *Liverpool, L. & G. Ins. Co. v. Verdier*⁸⁸ there were several companies having policies on the risk, among which was the Home, of New York, whose policy, it was claimed, had been voided, and it was insisted by the defendant in error that the plaintiff in error should pay on such basis of computation as would be proper if the Home policy had never existed. Justice Cooley, of the Michigan supreme court, said: "But the actual liability of the last-named company appears to me immaterial. The plaintiff in error required the insured to stipulate in their policy that in adjusting a loss other existing policies should be taken into account, even though forfeited; the plain purpose being to protect the company against the necessity of contesting with the insured any question of the validity or invalidity of other existing policies. This was a competent provision, and not unreasonable."

May, Ins.,⁸⁹ says, "The policy may provide for a pro rata liability, notwithstanding the invalidity of other policies, or the solvency of other companies."

In *Cassity v. New Orleans Ins. Ass'n*⁹⁰ the policy provided that "in no case shall * * * the assured be entitled to recover of this association any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or general floating policies, and without reference to the solvency or lia-

⁸⁸ 35 Mich. 395, 6 Ins. Law J. 202; *Heron v. Insurance Co.*, 4 Mont. Sup. Ct. (Can.) 388; *Hammond v. Insurance Co.*, 26 New Br. 389; *Cassity v. Association*, 65 Miss. 49, 3 South. 138; *London & L. Fire Ins. Co. v. Turnbull*, 86 Ky. 230, 5 S. W. 542; *Saville v. Insurance Co.*, 8 Mont. 419, 20 Pac. 646.

⁸⁹ (New Ed.) § 439.

⁹⁰ 65 Miss. 49, 3 South. 138.

bility of the other insurers." A forfeiture had occurred as to a co-insuring company, and plaintiff contended that the liability of the defendant should not be lessened on account of the other policy. Counsel argued that the practical and legal effect of the avoidance of the co-insuring policy was the same as a cancellation, or that such insurance had never existed; that the plaintiff was not compelled to maintain insurance in any specified sum; that a policy that did not insure was not insurance, within the meaning of the policy in suit. The court said: "We cannot yield our assent to this construction of the contract. We cannot, in applying the rule which construes the instrument most strongly against the insurer, close our eyes to the manifest purpose of the clause, and so refine upon language as to defeat the object sought to be accomplished. In the absence of a stipulation of this character, the insured might recover from any one of a number of insurers the whole loss sustained by him, leaving the party from whom full recovery had been had recourse upon the other insurers for contribution of the loss paid. Under such circumstances, it would devolve upon the company seeking contribution to establish the validity of the several contracts of insurance, and it would bear its proportion of the loss arising from the insolvency of one or more of its co-insurers. To obviate this inconvenience and hazard, the clause under consideration has been inserted in the policy. It casts upon the assured, not only the loss which may arise from the insolvency of any company insuring, but also the obligation of looking to such other insurers for the proportionate part of the loss, regardless of the liability of such insurer upon its policy."⁹¹

⁹¹ The Indiana court, in the case of *Phenix Ins. Co. v. Lamar*, 106 Ind. 513, 7 N. E. 241, 15 Ins. Law J. 686, was called to consider the legal effect of a similar stipulation, and reached the same conclusion as that of the Michigan and Mississippi courts here given, citing in support of this construction of the policy *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Liverpool, L. & G. Ins. Co. v. Verdier*, 35 Mich. 395.

§ 208. Co-Insurance Clause.

It is competent for the insurance company to limit its liability in respect to any particular risk to such proportion of the loss as the sum insured bears to the value of the whole property covered; it being the obvious intention of such stipulation to cause the insured to become mutually interested with the insurer in partial losses, and thereby to secure greater care and watchfulness in the protection of the property.⁹²

§ 209. Assignment of Policy.

Policies of fire insurance usually express the stipulation that if the property insured shall be sold, or if any change shall take place in title, interest, or possession, the liability of the company shall thereupon terminate. As the contract of insurance is personal, when the subject of insurance is sold, the insurer cannot, of course, be afterwards charged with a liability. This, however, is not wholly because the parties have so stipulated, but for the better reason that the person insured, having parted with his interest, has sustained no loss on account of the fire. The stipulation referred to is such a one as it is competent for the parties to make, and its validity is recognized by the courts. When its legal effect is to make the policy void on a sale of the property, the insured cannot claim a rescission, and payment of the unearned premium. After the sale, the policy being void, there is nothing to rescind, and the premium is forfeited.⁹³ If the insurer returns any part of the premium, or consents that the policy be transferred to the purchaser, it is an act of grace,—something that the insured cannot demand as a contract right. It no doubt frequently occurs that, when the company is satisfied with the character of the purchaser, it waives its right to the forfeiture, and consents that the

⁹² The clause in a policy limiting the liability of the insurer to such proportion of the loss as the sum insured bears to the value of property is just and reasonable, and ought to be enforced by the courts. *Christian v. Insurance Co.*, 101 Ala. 634, 14 South. 374.

⁹³ *Colby v. Insurance Co.*, 66 Iowa, 577, 24 N. W. 54; *Jackson v. Millsbaugh*, 103 Ala. 175, 15 South. 576.

policy continue valid to the vendee; but this is no more than business comity, and the frequency of this indulgence cannot be urged as creating a usage that will support an action to recover the unearned premium, or to compel the acceptance of the vendee as the insured, under the policy. In all such cases the insurer is absolved from further duty on account of its agreements, and may retain the unearned premium, and refuse its consent to the assignment of the policy.

§ 210. The Relations Created between the Insurer and Assignee of Policy are Wholly Independent of the Original Insured.

When the policy has been assigned with the consent of the company, a new and independent contract has arisen between the company and the assignee, and this contract will be subject to no forfeitures by reason of any acts or omissions of the person originally insured. It is wholly immaterial whether the company had or had not knowledge of such forfeitures when consenting to the assignment. A different rule has to some extent been permitted by the courts, founded upon a misconception of the relation of parties. It has been said—and correctly, too—that “a person cannot convey to another a right which he does not himself possess; that an assignee takes no more than the assignor can give.” The principle of law thus affirmed cannot be successfully disputed, but it does not apply to a class of assignments that are such only in name and form. As I have before explained, the assignee in fact takes nothing from the assignor. His policy was void and the unearned premium forfeited, before any transfer was attempted.

The assignment in such case has no other legal effect than to acquit the company as to the party first insured. This might be done in a different, and perhaps better, form, but the method chosen is sufficient to accomplish the object sought. It is a short, simple process to release the insurer as to one party, and bind it as to the other.⁹⁴

⁹⁴ *New v. Insurance Co.*, 5 Ind. App. 82, 31 N. E. 475; *Hall v. Insurance Co.*, 93 Mich. 184, 53 N. W. 727; *Bullman v. Insurance Co.*, 159 Mass. 118, 34 N. E. 169.

In *New v. Insurance Co.*, *supra*, it was held that the assignment of a policy

In *Continental Ins. Co. v. Munns*⁹⁵ the property had been mortgaged in violation of the conditions of the policy, which was subsequently assigned, on sale of the property, with the consent of the company, who had no knowledge of the forfeiture occasioned by this incumbrance. The court said "that the policy expires with the transfer of the estate, so far as it relates to the original holder; but the assignment and consent of the company constitute an independent contract with the assignee, the same in effect as if the policy had been reissued upon terms and conditions therein expressed. * * * The contract of insurance thus consummated arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued, embracing the terms of the old. In such a case no defense predicated on the supposed violations of conditions of the policy by the assignor will be available against the assignee."

The supreme court of Massachusetts was called to pass upon this question in the case of *Bullman v. North British & Mercantile Ins. Co.*⁹⁶ The contention there was that the transfer of the policy in suit, having been made by the wife to the husband, was without legal effect, being in contravention of the laws of that state; that the husband, who brought the action to recover, had acquired no rights which he could enforce. The court held otherwise. It said: "The property insured being transferred, the policy by force of its provisions and of the statute would cease. It is not a negotiable contract, but it has a value for the purpose of surrender to the company which issued it, and the effect of the transaction is that the insurance company says the policy shall be valid, according to its terms, to the new owner of the property. * * * It

has no legal effect, unless it is consented to by the insurer. Such consent is equivalent to the execution of a new contract between the insurer and the assignee, according to the terms of the policy assigned. Until the consent is given, there is no contract between the company and the assignee of the policy. No relations having been established, there is nothing to which waiver can apply. If there is any new duty which the insurer owes to the assignee, it is a moral, and not a legal, one. *Campbell v. Insurance Co.* (Tex. Civ. App.) 31 S. W. 310; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 41 N. E. 847.

⁹⁵ 120 Ind. 30, 22 N. E. 78.

⁹⁶ 159 Mass. 118, 34 N. E. 169.

is the assent of the insurer that gives efficacy to the transaction."

In Maryland it was held that the policy was assigned when indorsed loss payable to a third person. The legal significance of such indorsement was carefully considered and decided in *Hanover Fire Ins. Co. of City of New York v. Brown*.⁹⁷ The opinion in this case was a rehearing, and the court said: "The indorsement on the policy in this case was in these words: 'Loss, if any, payable to Alex. Brown & Son, as interest may appear.' We therefore thought that it was to be considered as assigned to Brown & Son, to protect their interests in the insured premises, as it might be shown to exist. The effect of an assignment of a policy of insurance is well known. When the insurance company assents to it, a new contract arises between it and the assignees, for all the terms and conditions of the policy; the assignee being substituted in place of the party originally insured, and becoming the owner of the property."

The court then explains that no person can recover under a fire insurance policy unless he has an interest in the property covered; and, while it intimates a doubt as to the correctness of the principle on which the assignment in this class of cases is predicated, it says that it is made the law of that state by force of the previous decisions of that court, to which reference is made.

Elsewhere I do not find any case where the court has committed itself to a rule so doubtful in principle, and one involving so much difficulty in its application. If it be true that the mortgagee appointed to receive the money due in payment of the loss, by virtue of such appointment becomes the "owner of the policy," then the owner of the property, who may have a paramount interest, ceases to be insured. The sum received by the mortgagee in settlement of loss would presumably apply in diminishing the debt secured by the mortgage.

But suppose such indebtedness was less than the loss covered by the policy, which the Maryland court says is owned by the mortgagee; the latter can recover from the insurer only to the extent of his interest; and as the mortgagor has lost his rights under the policy, on account of the assignment, there is only par-

⁹⁷ 77 Md. 64, 27 Atl. 314.

tial payment when full indemnity was contemplated, paid for, and promised.

In North Carolina it has been held that an assignee of a policy, by consent of the company, can recover for loss, although he has no insurable interest in the property insured. This, it would seem, is new law and of a doubtful quality. The courts have held, practically without dissent, that the legal effect of an assignment is the making of a new contract with the assignee. If such assignee has no interest in the property insured, he can have sustained no loss in its destruction. Such insurance is a wager, and opposed to public policy.⁹⁸

§ 211. Assignment for the Benefit of Creditors is an Alienation, within Meaning of Policy.

When the assignment is for the benefit of creditors, the alienation is practically absolute. The assignor surrenders voluntarily the possession and control of the property insured. The assignee has the authority to sell, and invest the purchaser with a title that will be good against all the world. An assignment of this kind is such a change of interest and possession as will create a forfeiture, unless consented to by the insurer.⁹⁹

§ 212. Assignment of Policy for Collateral Security does not Invalidate the Insurance, unless It is So Stipulated in the Policy.

The assignment of a policy to secure a loan, where there is no transfer of the property covered, will not invalidate the insurance, if done without the knowledge and consent of the company. Such action ordinarily will have no other legal effect than to create a lien on the insurance for the benefit of the assignee. The owner of the property continues to be the insured, and in case of loss it

⁹⁸ Blackburn v. Insurance Co., 116 N. C. 821, 21 S. E. 922. The doctrine of this case is a departure, as will appear from the statement of the law in McKinney v. Assurance Co. (Ky.) 30 S. W. 1004.

⁹⁹ Orr v. Insurance Co., 158 Ill. 149, 41 N. E. 854; Dube v. Insurance Co., 64 N. H. 527, 15 Atl. 141.

is he who must make the proofs required by the policy. By this assignment another person, the creditor, is made the payee, and his right to receive the money will be superior to that of any creditor who claims by virtue of a subsequent garnishment.¹⁰⁰

It was held in Pennsylvania, where the policy stipulated for forfeiture in case there was an assignment of any interest in the policy without the consent of the company, that an assignment as collateral security was fatal. The court reasoned that, "if the debt thus secured is a lien on the premises, a loss by fire might increase the value of the security, as when other liens precede, while if the debt is not a lien the collateral security is valuable only in case of loss; both of which positions are hostile to the insurer."¹⁰¹

§ 213. When Settlement is Conclusive.

When negotiations have ended in an agreement between the parties for one to pay and the other to accept a designated sum, both will be held to such agreement, unless it has been secured, to the injury of one party, through the deception and fraud of the other. The fact that either of the parties to a settlement had neglected to investigate before the agreement, and thereby had failed to fully understand, all the important facts affecting his rights, will not relieve performance. Even if it is shown that there had been forfeitures, of which the insurer had no knowledge when agreeing to pay, it will not be excused, if it appears that the information was available, and might have been obtained by the use of proper diligence.

In the case of *Smith v. Glens Falls Ins. Co.*¹⁰² Chief Justice Church said: "The settlement, and contract to pay a specified sum, operate as a waiver of any warranty in the policy, unless the settlement and contract were procured by fraud of the assured;

¹⁰⁰ *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680; *Griffey v. Insurance Co.*, 100 N. Y. 417, 3 N. E. 309, and 15 Ins. Law J. 198; *Mahr v. Bartlett*, 53 Hun, 388, 7 N. Y. Supp. 143; *Mahr v. Society*, 127 N. Y. 452, 28 N. E. 391, and 21 Ins. Law J. 113; *Leinkauf v. Calman*, 17 N. E. 389, 110 N. Y. 50; *Bibend v. Insurance Co.*, 30 Cal. 78; *Stout v. Insurance Co.*, 12 Iowa, 371.

¹⁰¹ *Ferree v. Trust Co.*, 67 Pa. St. 373, 8 Phila. 512.

¹⁰² 62 N. Y. 85.

and this is not found, and scarcely claimed. It is said that the company did not know of the breach of the warranty at the time of the settlement. The answer is that when the claim was made for loss the company was required to ascertain the facts as to any breach of warranty. If they saw fit to pay the claim, or compromise it, or to make a new contract, without such examination, it must be deemed to have waived it; and, in the absence of fraud, it cannot afterwards avail itself of such breach. It cannot urge payment or settlement by mistake on account of want of knowledge of such breach. The time for investigation as to breaches of warranty is when a claim is made for payment, and if the company elects to pay the claim, or, what is equivalent, to adjust it by an independent contract, it cannot afterwards, in the absence of fraud, retract or fall back upon an alleged breach of warranty."

The public good is promoted when persons agree among themselves in respect to what may become subjects of dispute. When this occurs the courts are relieved from burdens with which they might otherwise be charged; amicable relations are preserved, where strife and social disruption are liable to result. In the interests of the public, and in the interests of good neighborhood, settlements are very properly favored by the courts, and will not be set aside except for reasons that appeal strongly to considerations of justice. Facts important as affecting interests of the parties, and which, if known, would influence their judgment and action, will be presumed to have been understood and duly considered, if shown to have been accessible through reasonable care and diligence. The case will be otherwise, however, when it appears that either of the parties had consented to settlement prejudicial to his rights and interests, for the reason that information had been fraudulently concealed.¹⁰³

The courts have found some difficulty in fixing definite rules to

¹⁰³ This statement of the law is sustained by the following cases: *National Life Ins. Co. of U. S. v. Minch*, 53 N. Y. 144; *Lapeyre v. Thompson*, 7 La. Ann. 218; *Farmers' & Merchants' Ins. Co. v. Chesnut*, 50 Ill. 111; *Mutual Life Ins. Co. of New York v. Wager*, 27 Barb. (N. Y.) 354; *Bilbie v. Lumley*, 2 East, 469; *Stache v. Insurance Co.*, 5 N. W. 36, 49 Wis. 89; *Wagner v. Insurance Co.*, 143 Pa. St. 338, 22 Atl. 885; *Saville v. Insurance Co.*, 8 Mont. 419, 20 Pac. 616.

govern this class of cases. The facts that constitute the fraud relied upon, to justify the annulling of a settlement, must clearly establish a deception that has resulted to the injury of the complaining party.

In *Commercial Bank v. Firemen's Ins. Co.*¹⁰⁴ the facts show that there had been an agreement in regard to the amount of loss, and that proofs had been accepted in the usual form. Afterwards the defendant company, being informed that subsequent to the fire, and before the adjustment, an important alteration had been made in the stock account on the books of the insured, demanded that the adjustment be treated as a nullity, that claimant produce its books for further inspection, and that the president and secretary submit to a sworn examination. All of these demands were refused, and suit brought on agreement to pay. It was undisputed in the trial that the manufacturing account on the books had, by the arbitrary changing of two entries, been reduced \$13,000, and this was done before the books were submitted to the adjusters. The jury found that the adjusters, in their computation of the loss, did rely on the correctness of the manufacturing account as submitted to them. It also found that the adjusters were ignorant of the alterations referred to, when adjusting the claim. It was further found by the jury that the insured did change its books of account for the purpose of deceiving the adjusters, and inducing them to settle the loss in the manner they did. The jury was also asked if the inventory book was withheld or concealed from the defendant's adjuster, and, if so, whether the adjuster was induced by such concealment of the inventory to make the adjustment; and to both of these questions the jury replied affirmatively, and returned a general verdict for the defendant. The theory of the defense was that the settlement should be abrogated, and regarded as without legal effect, having been made without a knowledge of the true facts in regard to inventory and accounts, and the fault being that of the insured, who had purposely misled and deceived the adjuster. The defendant, however, had nowhere affirmatively shown that it had in any substantial manner been injured by the concealment of the inventory and alteration of the accounts as

¹⁰⁴ 87 Wis. 297, 58 N. W. 391.

stated, and the Wisconsin court held that there could be no fraud without injury. It said: "Unless the concealing of the inventory worked an injury to the defendant, it could not have been concealment of a material fact; and, if the alteration of the books wrought no damage, it was not fraud, within the meaning of the provisions of the policy."

§ 214. The Adjustment is the Making of a New Contract.

The plaintiff here, in bringing its action, assumed what the court intimates to be correct; that is, that the adjustment was the making of a new contract between the parties, and that the former one, evidenced by the policy, was superseded, and that its conditions in regard to the production of books, and examination under oath, had been made inoperative by virtue of the settlement, and, as a necessary corollary, that there could be no defense, under the terms of the policy, unless the adjustment was held without legal effect. This question was only incidentally presented by the record, and, of course, not decided by the court.

In *Whipple v. North British & Mercantile Fire Ins. Co.*¹⁰⁵ there was an agreement in writing between the plaintiff and adjuster of defendant as to the amount of damage sustained, to which was added an express stipulation that the assessment of loss should be subject to the terms and conditions of the policy. The plaintiff contended that this imported a new contract of settlement, and that the reservations stated referred only to the time and manner of payment. Chief Justice Durfee, while signifying his general assent to the proposition that in most cases the adjustment of loss implies a promise to pay, independent of the policy, and in no way qualified by any of its conditions and stipulations, except those that refer to the time and manner of payment, pointed out a clear distinction between this "adjuster's agreement," which committed neither of the parties to anything except the amount of damage, and a settlement which was a complete recognition of liability. He said: "The adjustment was made subject to the terms and conditions of the policy, and by the terms of the policy the

¹⁰⁵ 11 R. I. 139, 5 Ins. Law J. 71.

company is relieved from liability in case certain conditions or stipulations are not fulfilled by the insured. The adjustment, in view of the qualifying words, means simply that the company will pay the loss as fixed under the terms and conditions of the policy, if under them the plaintiff is entitled to payment."

The furnishing of proofs by the insured, and their acceptance by the insurer, do not create a contract between the parties, on which an action can be sustained to recover the loss. If there is no express promise to pay, the action must be on the policy. The courts will not give effect to a merely implied promise, at the cost of setting aside such important stipulations as the policy contains. The rule is different under a general submission to arbitrators. The agreement to submit implies a promise to pay the award, and this promise will support an action to recover, independent of the policy.

§ 215. When There is no Implied Promise to Pay an Award.

When, however, the submission is only to determine the amount of loss, and expressly reserves to the parties the right to settle all other questions in a different manner, there is no implied promise to pay the award, and in such case action should be brought on the policy.¹⁰⁶

In *Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*¹⁰⁷ we find a statement of facts which permits the application of, and aptly illustrates, the rule here contended for. The policy in that suit contained the usual conditions and stipulations concerning the production of books, arbitration, etc. There was involved insurance to the amount of \$127,000. A person named Palmer was in charge of the plaintiff's offices,—a bookkeeper and general utility man. While not an officer of the company, he appears to have been a person of so much intelligence that many details of an important business were left to his discretion. Palm-

¹⁰⁶ *Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633; *Soars v. Insurance Co.*, 140 Mass. 343, 5 N. E. 149.

¹⁰⁷ 98 Cal. 557, 33 Pac. 633.

er, it was shown, had been instructed by the managing director to turn over for the examination of the insurance companies all books and papers relating to their manufacturing business. The adjusters were urgent to secure information in regard to the cost of production, and were told by Palmer that he had no means of supplying the facts they required. This was subsequently shown to have been untrue; that Palmer had in fact prepared, or caused to be prepared, before that time, a careful computation of the cost of the harvesters and certain other machines manufactured by the plaintiff. This collected and tabulated information was entered in a book which was in the plaintiff's possession when these particular facts mentioned were demanded by the adjusters, and denied by Palmer. Baffled in their efforts to obtain from the insured the important knowledge they were seeking, concerning the cost of replacing the machines burned, they consented that the arbitrators chosen should return an award of \$90,000. This amount was largely in excess of the actual loss sustained, estimating the cost of the machines from data contained in the book prepared by Palmer, which was subsequently disclosed.

§ 216. Fraud Vitiates the Award.

The court held that the award had no greater binding effect than an agreement between parties, and that it was made void on account of the deception and fraud in withholding the itemized statement of cost to construct the machines covered by the policy. This information, the court said, was important, because the insurer had the right of replacement. I quote from the opinion: "It would seem very clear from these facts that the conduct of Palmer, in concealing from defendant the books and inventory referred to, and which conduct was the same, in effect, as a representation that there were no such books and inventories in existence, was a substantial inducement to the action of defendant in waiving its right to have an appraisalment of plaintiff's loss in accordance with the terms of its policy, and in consenting that such loss might be fixed at \$90,000 without any examination or exercise of judgment on the part of the arbitrators. In determining whether fraudulent representations or concealments are material to the contract sought

to be avoided therefor, the supreme court of Maryland, in the case of *McAleer v. Horsey*,¹⁰⁸ says: 'No better rule can be given for deciding the question than this: If the fraud be such that, had it not been practiced, the contract could not have been made, or the transaction completed, then it is material to it; but, if it be shown or made probable that the same thing would have been done in the same way if the fraud had not been practiced, it cannot be deemed material.' This same rule is also embodied in section 1569 of the Civil Code of this state. Nor is it necessary, in order to avoid a contract for false representations, that such representations should have been the sole inducement to the contract. Others may have concurred, and yet the parties upon whom the deceit was practiced be entitled to relief."¹⁰⁹

§ 217. Settlement Rests on Mutual Faith and Understanding.

The finality of a settlement, like the completion of a contract, will depend very much upon the good faith and good understanding of the parties. When an agreement has been reached in respect to all the terms of the adjustment, a promise to pay will be enforced, if there has been no mistake or fraud. The mistakes must refer to facts, and not to matters of judgment, and the fraud may consist in misrepresentation or concealment of important facts. When the promise to pay is based on mistakes of this kind, and the settlement is without merit, and has been procured by one party without the surrender of any substantial right on the part of the other, it may be repudiated, and a new accounting had.¹¹⁰

A false statement of facts made by either party, although without any intention to deceive, if of such a character as to have an important influence in causing one or the other to abandon substantial rights, will render the adjustment void. "Settlement"

¹⁰⁸ 35 Md. 439.

¹⁰⁹ 2 Pom. Eq. Jur. (2d Ed.) § 890; *Addington v. Allen*, 11 Wend. (N. Y.) 375; *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *Safford v. Grout*, 120 Mass. 20; *James v. Hodsden*, 47 Vt. 127; *Bigelow, Frauds*, p. 6.

¹¹⁰ *Christian v. Insurance Co. (Ala.)* 14 South. 374.

means an "agreement." An agreement generally signifies an intelligent understanding of facts affecting the rights in dispute. If, therefore, in the balancing of these rights, a wrong is done to either of the parties, it is quite immaterial, so far as the personal injury is concerned, whether it is the result of fraud, or of an innocent mistake.¹¹¹

§ 218. The Party Asking to have Settlement Set Aside must Offer to Return any Consideration He has Received on Account of Such Settlement.

When settlement of loss is concluded, and payment made, the courts will not set it aside unless it is shown that an offer has been made to refund the money. A person will not be permitted to repudiate a contract, while retaining its benefits.¹¹²

There has been a departure from this rule in the state of Washington, where it was held not to be necessary, before bringing suit to rescind a settlement, that the consideration should be returned.¹¹³

§ 219. Personal Opinions Generally without Legal Effect.

In the discussion which frequently occurs during the negotiations that precede settlement, it should not be understood that the expression of erroneous opinions has the same legal effect as the statement of facts. The opinions and conclusions of the parties, it may be presumed, will be influenced by personal considerations. They refer to causes too obscure and too complex, as affecting the will, judgment, and interest of the parties, to enable the courts to suppress or place them under responsible restraint.¹¹⁴ Nor can a compromise settlement be annulled on account of frauds existing

¹¹¹ *Berry v. Insurance Co.*, 30 N. E. 254, 132 N. Y. 49, and 21 Ins. Law J. 455; *American Ins. Co. v. Crawford*, 89 Ill. 62.

¹¹² *Brown v. Insurance Co.*, 117 Mass. 479; *Potter v. Insurance Co.*, 63 Me. 440; *Home Ins. Co. v. McRichards*, 121 Ind. 121, 22 N. E. 875.

¹¹³ *Sanford v. Insurance Co.*, 11 Wash. 653, 40 Pac. 609.

¹¹⁴ *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283, 8 Ins. Law J. 350.

at the time, but unknown to the party whose interests were injuriously affected until afterwards.¹¹⁵

§ 220. Conclusions.

Insured, on the occurrence of a loss, must promptly give notice of the fact, and, as soon thereafter as it is stipulated in the policy, serve the required proofs.

If requested, the insured must exhibit his books and invoices at all reasonable times and places, and submit personally to an examination under oath.

When the insured purposely absents himself to defeat the sworn examination, his absence will be regarded as equivalent to a refusal to comply with the condition.

In the settlement of loss claims to determine the rights of the parties, resort must be had to the stipulations and conditions of the policy. These should be construed fairly, and in reference to what was intended by the insured and insurer when entering into the engagement. The insistence on technical defenses will cause "moralities to shriek aloud," when there are no supporting equitable considerations.

It will not always be safe to conclude that a defense is barren of equity because the claimant has done no intentional wrong, or because the loss cannot be directly traced to the violation of a condition. It may not be clearly apparent in what manner an incumbrance or a qualified ownership has increased the hazard. If there be a subtle relation between the inhibited mortgage and the destruction of the property by fire, to establish the fact may baffle the best-directed inquiries. We cannot know how far the accident has been caused by negligence, nor to what extent watchfulness has been diminished on account of the incumbrance or defect in title. We do know that with the average person there will be found a greater zeal, and a more wakeful vigilance, in taking care of that which is his own, than that which is owned by an-

¹¹⁵ *British America Assur. Co. v. Wilkinson*, 23 Grant (U. C.) 151.

The contrary doctrine was held where it was afterwards ascertained that the insured purposely set the fire. *Queen Ins. Co. v. Devinney*, 25 Grant (U. C.) 394.

other. Anything, therefore, which lessens the insured's interest in the property covered, it may be fairly assumed, will lessen the care which the insurer has contemplated it would receive. Understanding the difficulties involved in any inquiry that seeks to find a motive proceeding from mental or moral conditions of the insured, the underwriter has bargained in advance that he shall be relieved from that well-nigh impossible task, by stipulating that if the property be mortgaged, or if the insured be not the sole and unconditional owner, the fact must be disclosed. In respect to this class of conditions, if the insurer insists upon strict performance it would be unjust to say that he is seeking to escape liability on purely technical grounds. While the equity is sometimes not easily distinguishable, it inheres to the stipulation; it exists in the possibilities which both parties have recognized, and which form the basis of their agreement.

The measure of damages may be either more or less than the cost to replace. Indemnity does not contemplate giving new for old. The insured cannot fairly claim to be put in a position of greater advantage than he enjoyed before the fire.

The insurer has the option to replace, but he may refuse to do so. Buildings, as well as merchandise, may be computed according to their commercial value. A building that is old, or badly located in reference to the uses for which it is adapted, is of less value than one newly constructed, or if situated near the centers of trade. Rents will frequently better indicate the value of a building than a computation of the material and labor required in its construction.

When buildings are situated within fire limits, and their reconstruction inhibited by the local authorities, it will sometimes occur that their value is greater than the cost to rebuild. When this happens, rents will be the best guide in ascertaining the true measure of damage.

Unnecessary expense need not be considered in computing the cost of production, as in the early settlement of the country the pioneers for convenience often used native woods, which since have become of great value, for the construction of the framework of their barns and dwellings. In an estimate for rebuilding, consideration must be given to the suitability of material to

uses; and if it is found that, for the sills and beams of a house or barn, pine is in all respects as good as walnut, the former, instead of the latter, may be used, though it was otherwise in the building burned.

Patents do not enhance values above the cost of replacement. It is the machine or device that is insured, not the monopoly of manufacturing or vending secured to the patentee.

When the insurer elects to rebuild, the decision is irrevocable, and, should he then fail to perform, he will be liable in an action for damages on his contract to replace. The insurer will not be excused from performance after his election to rebuild because he is prohibited by the local authorities from erecting a similar building to the one burned. If the building insured was constructed of wood, and the rebuilding of frame structures is interdicted by municipal law, the insurer, in replacing the building, must use brick, or such other material as will be permitted.

When several companies have policies on a building burned, and they agree among themselves that they will replace, and so notify the insured, the engagement, as between the companies and the insured, is several, and not joint; and, should one or more of the companies interested subsequently settle with the insured, the entire obligation of restoring the building will rest upon the remainder of the companies. When the insurer rebuilds on an election, he will have no claim against the insured on account of any difference between new and old.

When the loss is payable to a mortgagee, or to any other person, whether interested as creditor in the property or not, the right to rebuild will continue unimpaired. This right is based upon contract stipulations, and may be asserted, irrespective of the manner in which the interests of third parties will be affected. When plans and specifications are demanded of the insured by the company electing to rebuild, and refused, he cannot subsequently complain that the restored building is unlike the one destroyed. The insured cannot obstruct the company in exercising its rights under the policy to rebuild, and, should he attempt to do so, it will be at his peril.

Valued policy laws do not usually take away from the insurer the right to rebuild. This, being secured by contract, cannot be

taken away by mere construction. Unless the statute by express terms nullifies the contract provision, the latter will remain, and be enforced by the courts. When the right to rebuild exists, as it does, so far as I am informed, in all the states, except Texas, having valued policy laws, if the insured withholds opportunity, or in any manner prevents performance on the part of the company, he will forfeit all right to recover on his policy.

When policies provide, as is usually the case, that the company shall not be liable for any greater proportion of the loss than the sum insured under its policy bears to the total amount of insurance on the property, whether valid or not, it may insist that the loss shall be apportioned among all the policies on the risk; and this right is in no way limited or qualified by the fact that any of the policies are invalid, or that any of the companies insuring, or "purporting to insure," have become insolvent.

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CHAPTER XI.**NOTICE AND PROOFS OF LOSS.**

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§ 221. When and in What Manner Notice of Loss must be Given.

It is almost without exception a requirement of the insurance policy that, on the occurrence of a loss, the insured shall give immediate notice in writing. In some policies, a definite time is specified within which the notice must be given, as "five days" or "ten days." If the insured neglects to comply with the terms of

this condition, it will be at his peril.¹ The requirement is as reasonable as it is imperative, and has been enforced with great strictness by the courts. The destruction of property by fire is always a calamity to the underwriter who has assumed the risk. The severity of these disasters may frequently be relieved, and their extent lessened, by prompt and efficient action. Buildings partly destroyed, by timely care may be saved from further injury on account of storms. Valuable merchandise that may be exposed to pillage, or the destructive influences of the elements, may sometimes need to be housed, and perhaps dried and assorted, to prevent unnecessary and otherwise unavoidable loss. Important facts, too, in regard to the origin of the fire, affecting the good faith of the claimant, can be more easily ascertained before opportunity has been afforded to remove or conceal evidences of fraud and evil practice. These facts are well understood by the insurer, the public, and the courts, and the provision of the policy that early notice shall be given of the loss is reasonable, and imposes no arbitrary or burdensome duty. The requirement that notice

¹ If notice is required "forthwith," it must be furnished within a reasonable time. *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553.

It is a condition precedent, and nonperformance will not be excused. *Sherwood v. Insurance Co.*, 10 Hun (N. Y.) 593; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555.

Immediate notice is construed to mean as soon as possible,—“due diligence.” *Cashau v. Insurance Co.*, 5 Biss. 476, Fed. Cas. No. 2,499; *Continental Ins. Co. v. Lippold*, 3 Neb. 391; *Rokes v. Insurance Co.*, 51 Md. 512; *Home Ins. Co. v. Davis*, 98 Pa. St. 280, 12 Ins. Law J. 449; *Wooddy v. Insurance Co.*, 31 Grat. (Va.) 362; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644, 11 Ins. Law J. 614; *Scammon v. Insurance Co.*, 101 Ill. 621.

When a company sends an adjuster, it is conclusive that it has notice of the loss, and it is not material as to the manner in which it was given. *Welsh v. Assurance Corp.*, 151 Pa. St. 607, 25 Atl. 142.

Notice is a condition precedent. *Germania Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 11 Ind. App. 385, 39 N. E. 304.

When the policy provides that notice must be made in a particular time and manner, performance is a condition of recovery. *Ermentraut v. Insurance Co. (Minn.)* 65 N. W. 635.

Notwithstanding policy provides that notice shall be given in writing, oral notice will be sufficient, if company is actually informed, and takes action in respect to loss. *German Fire Ins. Co. v. Stewart (Ind. App.)* 42 N. E. 286.

shall be in writing, while adding character and dignity to the transaction, and emphasizing its importance, is chiefly intended to prevent misunderstanding and uncertainty. To the formality of written words, the law and common usage attach a credibility and importance that are denied to oral communications. The written notice will generally be more definite, less likely to be forgotten or misunderstood, and hence more certain to command attention at the proper time. But, as to the form in which notice shall be given, it appears to be well settled that it will be sufficient when notice of the loss is given verbally to the insurer's agent, providing he immediately, or within the specified time, transmits the same in writing to the company. But if no notice is furnished, or if not furnished within the time which the policy prescribes, it will be fatal to a recovery.

May on Insurance² states the law to be: "A failure to give notice within the time required stands upon different grounds from failure to give notice in due form. The latter defect may be remedied by a new and more accurate form; but the former, if insisted upon by the insurer, is irremediable."

In support of the rule here stated, the authorities are all in accord. If the notice given is defective in form, it is the duty of the insurer to decline to receive it, and to point out promptly and specifically the grounds of his objection. Failing to do this, he will be deemed to have waived the insufficiency of the notice. But the case is otherwise when notice comes too late. Silence in that event works no wrong to the insured, for the default cannot be cured by reason of anything which he may subsequently do.³

² Section 464.

³ Nineteen days after loss is not "forthwith." *Weed v. Insurance Co.*, 133 N. Y. 394, 31 N. E. 231.

When immediate notice is required, 33 days will be too late. *Quinlan v. Insurance Co.*, 15 N. Y. Supp. 317; *Id.*, 133 N. Y. 356, 31 N. E. 31.

Fourteen days is not immediate notice. *La Force v. Insurance Co.*, 43 Mo. App. 518.

"Forthwith" means due diligence. *Edwards v. Insurance Co.*, 75 Pa. St. 378.

Notice within six days after the loss is not "immediate." *Railway Passenger Assur. Co. v. Burwell*, 44 Ind. 460.

Insured lived 12 miles from place of fire, and gave notice as soon as he

§ 222. When Proofs of Loss must be Furnished.

The same general principles of law are as applicable to proofs as to notice of loss. Both relate to important exigencies, and point to an urgency of affairs where postponement implies further loss and increased difficulties. Both are made conditions precedent, to secure prompt attention and such disclosures as the insurer has found necessary, to prevent waste, and to protect itself from imposition and fraud. There are but few questions arising out of the insurance contract that have been more frequently before the courts than those that relate to proofs of loss. While the validity of that particular condition of the policy has seldom been disputed, there has been much contention in regard to the sufficiency of proofs, the time within which they may be furnished, and as to words spoken or acts performed, on the part of the insurer, that either have or have not constituted a waiver. If the insurer, before the expiration of the time within which proofs are required to be furnished, denies liability for any cause, it is held a waiver, and the insured is wholly absolved from any duty in the matter.⁴ When all liability is disclaimed, the making of proofs, the courts hold, becomes an unnecessary work, which they will not require. While in cases of this kind the insured is usually excused from performance on the ground that proofs have been waived, it is not easy to discover in a simple denial of liability any of the distinctive elements of a waiver. The legal principle involved appears

learned of it, which was four days after its occurrence. Held to be sufficient compliance. *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149, 4 Atl. 8, and 16 Ins. Law J. 47.

⁴ Denial of liability is waiver of proofs of loss. *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865; *Lum v. Insurance Co. (Mich.)* 62 N. W. 562.

Request for arbitration waiver of proofs. *Fritz v. Insurance Co. (Pa. Sup.)* 26 Atl. 14.

Demand for arbitration waiver of proofs. *Walker v. Insurance Co.*, 51 Kan. 725, 33 Pac. 597.

When sworn examination is demanded, proofs are waived. *Enos v. Insurance Co.*, 4 S. D. 639, 57 N. W. 919; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 South. 46; *Weidert v. Insurance Co.*, 19 Or. 261, 24 Pac. 242; *Harrison v. Insurance Co.*, 67 Fed. 577; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. 383.

to me rather to be, "That need not be done which it is unnecessary to do." But as conditions precedent must be performed, whether useful or not, this fiction of a "waiver" is introduced to provide an easy method of degrading the "condition" to the character of an ordinary covenant. While this construction, adopted by the courts, involves a fallacy, and marks an important departure from underlying legal principles, substantial justice is no doubt often secured; but it may hereafter be found that the benefits gained to the individual have been purchased at a cost to the system and rules of our jurisprudence that cannot well be afforded.

§ 223. When a Definite Time is Stipulated, unless There is Waiver, There must be Performance.

When the policy provides that proofs shall be furnished forthwith, it is construed to mean that there must be no unreasonable delay. The insured must act promptly, and present the evidence of his loss as soon as it can be done, in view of the circumstances which the case may present. If there are books to be examined, or stock to be recovered from the ruins, and inventories to be made, sufficient time will be allowed to perform every necessary duty in a deliberate, orderly, and intelligent manner. The words "forthwith," and "as soon thereafter as possible," are construed to mean the same thing; but when a definite time is specified, as "thirty" or "sixty" days, neglect or delay beyond such time in furnishing proofs will be fatal,⁵ if the language of the policy makes the furnishing of proofs within the time designated a condition precedent.⁶

The law on this point is very clearly stated in *Owen v. Farmers'*

⁵ Wood, Ins. § 436; May, Ins. § 465.

⁶ When the policy expresses that proofs must be filed within a designated time, unless waived, there must be compliance. *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Shapiro v. Insurance Co.*, 51 Minn. 239, 53 N. W. 463; *Dwelling-House Ins. Co. v. Osborn* (Kan. App.) 40 Pac. 1099; *Blossom v. Insurance Co.*, 64 N. Y. 162; *McDermott v. Insurance Co.*, 44 N. Y. Super. Ct. 221; *Cameron v. Insurance Co.*, 6 Ont. 392; *Bowes v. Insurance Co.*, 4 Pugs. & B. 437-452; *Gould v. Insurance Co.*, 90 Mich. 302, 51 N. W. 455, and 21 Ins. Law J. 328.

Joint-Stock Ins. Co.⁸ The court said: "The question presented on this appeal is whether the omission of the plaintiff to deliver a particular account of his loss and damage within ten days after such loss, according to the seventh section of the condition annexed to the policy, is fatal to his right of recovery. Such provision is doubtless a condition precedent, the performance of which by the plaintiff is indispensable to the right of recovery. * * * Time, too, is the essence of the contract in conditions of this kind, and there is no power in the court to dispense with a condition or excuse the nonperformance of it. It is only when a duty is created by law that a party is excused from performing it, if performance is rendered impossible by act of God, and not when the duty is created by contract."

This statement of the law stands undisputed, and is strongly supported by a large number of decisions from the ablest courts in both England and America.

When the requirement that "proofs of loss" shall be furnished within a stated time is not in the form of a condition, or of an express warranty, failure to comply will not prevent recovery under the policy.⁹

What words should be added, and what words should be omitted, to give to the phrase employed such force and legal significance, has been the subject of much discussion, and a matter involving wide differences of opinion, during the past five or six

⁸ 57 Barb. (N. Y.) 521.

⁹ Delay in serving proofs, unless by the terms of the policy made the cause of forfeiture, will not prevent recovery. *Carpenter v. Insurance Co.*, 52 Hun, 249, 4 N. Y. Supp. 925; *Sun Mut. Ins. Co. v. Mattingly*, 77 Tex. 162, 13 S. W. 1016; *Kenton Ins. Co. v. Downs*, 90 Ky. 236, 13 S. W. 882, and 19 Ins. Law J. 923; *Tubbs v. Insurance Co.*, 84 Mich. 646, 48 N. W. 296, and 20 Ins. Law J. 463.

Under a different form of policy, it was held by the Michigan court that a failure to file proofs at the time required would be fatal to recovery. See *Gould v. Insurance Co.*, 90 Mich. 302, 51 N. W. 455, and 21 Ins. Law J. 328.

Failure to furnish the proofs within the prescribed time does not defeat recovery. *Vangindertaelen v. Insurance Co.*, 82 Wis. 112, 51 N. W. 1122; *Rheims v. Insurance Co. (W. Va.)* 20 S. E. 670; *German Ins. Co. v. Brown (Ky.)* 29 S. W. 313; *Kahnweiler v. Insurance Co.*, 57 Fed. 562; *Steele v. Insurance Co.*, 93 Mich. 81, 53 N. W. 514.

years. Previous to that time, the right of the insured to have the "proofs of loss" at the time and in the manner stipulated had gone unchallenged.

§ 224. If Proofs Filed are Unsatisfactory, the Insurer must State His Objection within a Reasonable Time.

When proofs are served within the time which the policy requires, but are defective and unsatisfactory, either in form or substance, objection must be made with reasonable promptness, or the insurer will be estopped from setting up such defects as a defense, should suit be brought to recover. The company must speak its dissent, when silence would naturally be understood as approval, if not satisfied with the proofs furnished.¹⁰ The courts will not permit the insurer to claim the benefit of a default that has come to exist, either by what he has said or done, or failed to say or do, when it was his duty to speak or act, and on account of which the claimant may have been fairly misled into supposing that nothing more would be required. If proofs come too late,

¹⁰ When proofs are received without objection, defects will be deemed waived. *Welsh v. Assurance Corp.*, 151 Pa. St. 607, 25 Atl. 142.

If "proofs of loss" are unsatisfactory, it is the duty of insurer to return them, specifically mentioning the objection. *Western Home Ins. Co. v. Richardson*, 40 Neb. 1, 58 N. W. 597.

Defects in proofs waived, when retained without objection. *First Nat. Bank v. American Cent. Ins. Co.*, 58 Minn. 492, 60 N. W. 345; *Roberts v. Insurance Co.*, 90 Wis. 210, 62 N. W. 1048; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. 383; *O'Conner v. Insurance Co.*, 31 Wis. 160; *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382, 404; *Patterson v. Insurance Co.*, 64 Me. 500; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Swan v. Insurance Co.*, 52 Miss. 704; *Young v. Insurance Co.*, 45 Iowa, 377.

Each specific objection must be pointed out, or it will be waived. *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich. 289; *Insurance Co. of North America v. Hope*, 58 Ill. 75; *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465; *Williams v. Insurance Co.*, 50 Iowa, 561; *German Ins. Co. v. Ward*, 90 Ill. 550, 8 Ins. Law J. 607; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Badger v. Insurance Co.*, 49 Wis. 389, 5 N. W. 845; *Titus v. Insurance Co.*, 81 N. Y. 410; *Davis Shoe Co. v. Kittanning Ins. Co.*, 138 Pa. St. 73, 20 Atl. 838; *Mosley v. Insurance Co.*, 55 Vt. 142, 13 Ins. Law J. 97; *Bull v. Insurance Co.*, 15 Ont. App. 421.

there is no obligation resting upon the insurer to so inform the claimant. To remain silent may, it is true, be understood by the insured as acceptance by the insurer in full compliance under the terms of the policy, but there will be no waiver or estoppel, for the insured will lose no right by such silence. The time having already expired within which proofs can be furnished, the insured can do nothing to cure his neglect and save forfeiture. Therein the case is different from what it would be if proofs were bad in form, or did not contain the information required. If the claimant's attention was promptly called to these facts, the form could be corrected, and the needed information supplied, and no right lost to the insured.¹¹

§ 225. When Technical Defenses will be Waived on Demanding Proofs of Loss.

When there has been an avoidance of the policy on account of a breach of warranty, or a failure to perform any of its conditions, and the fact has been brought to the knowledge of the company, the right to set up such technical avoidance as a defense to a suit on the policy will be waived if proofs of loss are demanded; and when proofs are voluntarily furnished after such forfeitures are known to the company, the better practice is, if the insurer intends to insist upon the forfeitures, to either return them, or offer to do so, stating frankly the grounds of avoidance. To pursue a different course, and silently retain the proofs, would not, perhaps, involve any actual peril, as such an act could hardly be interpreted by any fair-minded court as an implied recognition of the continued validity of the policy. The attitude, however, is one liable to be misunderstood. It is seldom quite safe to occupy a border ground of doubt and obscurity, where waiver may lie as a pitfall under the insurer's feet.

In *Brink v. Hanover Fire Ins. Co.*¹² it was held: "If proofs are not served within time, and the insurer has done nothing to in-

¹¹ *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Massé v. Insurance Co.*, 22 L. C. Jur. 124; *Bell v. Insurance Co.*, 19 Hun (N. Y.) 238.

¹² 70 N. Y. 593.

duce the omission, the assured has lost all right under the policy, and the insurer has become absolved from all liability. After that the insured cannot, by his own act, restore the contract, or reimpose a liability upon the insurer. That can only be done by a new agreement, founded upon a new consideration."

When the proofs served are defective in respect to several matters, and are refused for that reason, each of the several grounds of objection must be stated, that the insured may know definitely in what particulars further proof is required.¹³ If the refusal to accept proof is based upon their insufficiency in one respect, when other defects exist, the company will be held to have waived its objections as to all such matters as are not mentioned and specially pointed out at the time the proofs are returned, or reasons stated why they are unsatisfactory. In support of this proposition, the authorities are numerous, and its correctness may safely be assumed as indisputable.

§ 226. What Proofs must Contain.

What proofs must contain will very much depend upon the requirements of the policy and the circumstances which each individual case presents. When the policy provides for a "particular statement," as many do, it will not be sufficient to state the loss (if on chattels) in a gross sum.¹⁴ The insured must furnish as particular an account as the nature of the case will admit. This may often consist of itemized schedules, as in the case of household goods, machinery, etc. If the loss relates to a stock of merchandise, invoices and books of account must be produced for the inspection of the company's officers and agents, and, if required, the claimant must submit to a personal examination, under oath, as to any proper matters of inquiry concerning his interest in the property destroyed or damaged, the nature and extent of the loss, and the origin of the fire.¹⁵

¹³ *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich. 289.

¹⁴ *Wellcome v. Insurance Co.*, 2 Gray (Mass.) 480; *Catlin v. Insurance Co.*, 1 Sumn. 437, Fed. Cas. No. 2,522.

¹⁵ Plaintiff testified as to what the proofs of loss set forth, and said that the size of building and its value were stated, and that he had also given the

§ 227. Who has Authority to Waive Proofs of Loss.

With much uniformity the courts have held that proofs of loss cannot be waived, except only by such agents of the insurer as value of the contents of building. Held, that proofs should contain more, to answer the requirements of the policy. *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698.

The policy provided that the insured should, in case of loss, within 14 days furnish such particular account of the property destroyed as the nature and circumstances of the case would admit. The insured, however, only made an affidavit, in which was set forth generally the character of the property insured, and that his invoice book had been burned, which prevented the making of a particular statement of the loss, but that from his best means of information he estimated the loss at between \$3,000 and \$4,000. The jury was required to answer interrogatories. Two of the questions were directed to the fact as to whether the plaintiff could have made a fairly complete schedule of the contents of the store immediately before the fire. These questions the jury left unanswered. Held, that the evidence showed that the plaintiff could have made a tolerably complete list of the goods lost, that the condition had not been complied with, and that there could be no recovery. *Nixon v. Queen Ins. Co.*, 23 Can. Sup. Ct. 26.

Books and invoices must be furnished, when required, or bona fide effort made to procure them. *Langan v. Insurance Co.*, 162 Pa. St. 357, 29 Atl. 710; *Ward v. Insurance Co.*, 10 Wash. 361, 38 Pac. 1127.

What constitutes sufficient bookkeeping. *Liverpool & London & Globe Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006.

Where policy required that inventory should be made annually, one must be taken within a reasonable time after the insurance becomes effective. *Allen v. Insurance Co. (Mich.)* 64 N. W. 15.

There must be a substantial compliance with the requirements of policy in regard to proofs. Particular information is what the insurer has stipulated for, and is entitled to have. *Goldsmith v. Insurance Co.*, 27 U. C. C. P. 435; *Willis v. Insurance Cos.*, 79 N. C. 285; *Cameron v. Insurance Co.*, 6 Ont. 392.

Where there was an insurance of \$1,000 on building and \$300 on contents, and the books and invoices were lost, it was held a sufficient compliance with policy requirement, that a particular statement should be made, for insured to set out in his affidavit, without specifications, that loss was \$1,495. *McLaughlin v. Insurance Co.*, 23 Wend. (N. Y.) 525; *Sexton v. Insurance Co.*, 9 Barb. (N. Y.) 191; *Norton v. Insurance Co.*, 7 Cow. (N. Y.) 645; *Hoffman v. Insurance Co.*, 1 Rob. (N. Y.) 501, 19 Abb. Prac. (N. Y.) 325; *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259.

An examination under oath may secure all the information required to be furnished in the formal proofs. When this occurs, other proofs need not

have authority in respect to the adjustment of claims. However, in deciding the case of *Franklin Fire Ins. Co. v. Chicago Ice Co.*,¹⁶ a different opinion prevailed. The Franklin policy contained the following provision: "Nothing but a distinct, specific agreement, clearly expressed and indorsed on the policy, shall operate as a waiver of any written or printed condition therein." The court held that this limitation applied only to acts of the agent before the fire, and that he had the power to waive the production of proofs, either orally or by his conduct.

An agent can bind his principal only when acting within the apparent scope of his authority. If recognized as having powers in one relation, the law will not presume that he has also powers in another and independent relation. Authority to make a contract to insure raises no presumption of authority to adjust losses. It is well understood that these duties are very distinct in their character, and that, in the satisfactory performance of each, persons are employed having talent or educational qualifications specially fitting them for the particular duties to which they are appointed. A claimant dealing with the local agent in respect to the adjustment of a loss will do so at his peril, unless such agent has been held out by the company for which he undertakes to act as having authority to perform such duties. The case of *Franklin Fire Ins. Co. v. Chicago Ice Co.*, before referred to, stands almost alone in conferring by judicial fiat authority upon an agent which the principal has thought it wise to withhold.

be offered, unless asked for. *O'Brien v. Insurance Co.*, 52 Mich. 131, 17 N. W. 726, and 13 Ins. Law J. 825; *Badger v. Insurance Co.*, 49 Wis. 389, 5 N. W. 845.

Proofs must state the other insurance, if required by policy, *Battaille v. Insurance Co.*, 3 Rob. (La.) 384; must state value of property damaged or destroyed, and insured's interest therein, *Wellcome v. Insurance Co.*, 2 Gray (Mass.) 480; *Lycoming County Ins. Co. v. Updegraff*, 40 Pa. St. 311.

"Proofs of loss" must be verified by oath, and by "books and vouchers." *Greaves v. Insurance Co.*, 25 U. C. Q. B. 127; *Carter v. Insurance Co.*, 19 U. C. C. P. 143.

Information furnished in "proofs" should be sufficiently full and precise to enable the company to form an intelligent judgment of loss. *Banting v. Insurance Co.*, 25 U. C. Q. B. 431; *Citizens' Ins. Co. v. Doll*, 35 Md. 89.

¹⁶ 36 Md. 102.

A better rule of law was stated by Rapello, J., in deciding *Bush v. Westchester Fire Ins. Co.*¹⁷ He said: "It cannot be held that the authority of an agent to receive proposals for insurance, counter-sign and deliver policies, extends to adjusting losses or waiving the stipulated proofs of loss, and binding the company to pay without them. Neither can it be held that the mere fact that such an agent assuming in a particular case to do those acts establishes his authority."¹⁸

§ 228. When the Right to Rebuild is Taken Away by Statute, Formal Proofs may not be Required.

It has been held in certain states, having a form of statute making the amount written in the policy, when the insured property is wholly destroyed, the measure of damage, and a liquidated demand, that the right to rebuild or restore the property does not survive. This being the case it is a logical conclusion that the proofs of loss required by the terms of the policy can serve no useful purpose, and need not be furnished. If the statutes mentioned have the legal effect to nullify an express agreement of the parties, and an important provision of the contract, in respect to rebuilding the property burned, then it necessarily follows, as the courts have sometimes

¹⁷ 63 N. Y. 531.

¹⁸ *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518, and 16 Ins. Law J. 330; *Bowlin v. Insurance Co.*, 36 Minn. 433, 31 N. W. 859, and 16 Ins. Law J. 305; *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660; *Bonneville v. Assurance Co.*, 68 Wis. 298, 32 N. W. 34; *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353; *Knudson v. Insurance Co.*, 75 Wis. 198, 43 N. W. 954; *Barre v. Insurance Co.*, 76 Iowa, 609, 41 N. W. 373.

When the policy provided that no officer, agent, or employé, except secretary, could waive any of the policy conditions, it was held that the adjusting officer could not waive "proofs of loss." *Kirkman v. Insurance Co.*, 90 Iowa, 457, 57 N. W. 952.

Proofs in Alabama may be waived by local agent, *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 South. 46; can be waived only by persons having real or apparent authority, *Weidert v. Insurance Co.*, 19 Or. 261, 24 Pac. 242; *Harrison v. Insurance Co.*, 67 Fed. 577; *Hollis v. Insurance Co.*, 65 Iowa, 454, 21 N. W. 774.

held, that formal proofs are useless, and that the requirements of the policy in relation thereto should be treated as a nullity.¹⁹

§ 229. When Proofs will be Excused.

When a company has knowledge of a loss, and its adjuster proceeds in the usual manner to ascertain the material facts and compute the damage, has interviews with the insured, makes careful and critical inquiry concerning values, examines books and invoices, and goes away without intimating a desire for further information, the insurer will be estopped from pleading, in defense to an action to recover on the policy, that no formal proof of the loss has been furnished in the manner and time which the policy provides.²⁰

Denial of liability will be a waiver of proofs,²¹ and a demand for proofs will be treating the policy as valid and a waiver of known de-

¹⁹ Under the operation of the valued policy law, when the property is totally destroyed, technical proofs are unnecessary. *Commercial Union Assur. Co. of London v. Meyer*, 9 Tex. Civ. App. 7, 29 S. W. 97; *Georgia Home Ins. Co. v. Leaverton* (Tex. Civ. App.) 33 S. W. 579; *Continental Ins. Co. v. Chase*, Id. 602; *Phoenix Ins. Co. v. Levy*, Id. 992.

²⁰ *Roberts v. Insurance Co.*, 90 Wis. 210, 62 N. W. 1048; *Union Ins. Co. of California v. Barwick*, 36 Neb. 223, 54 N. W. 519; *Little v. Insurance Co.*, 123 Mass. 380; *Kennedy v. Insurance Co.*, 6 Ins. Law J. 359; *Edgerly v. Insurance Co.*, 48 Iowa, 644; *Mitchell v. Insurance Co.*, 40 Ill. App. 111; *Perry v. Insurance Co.*, 11 Fed. 482, 11 Ins. Law J. 387; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285, and 16 Ins. Law J. 53; *Craigton v. Insurance Co.*, 39 Hun (N. Y.) 319; *Oshkosh Gas-Light Co. v. Germania Fire Ins. Co.*, 71 Wis. 454, 37 N. W. 819; *Miller v. Insurance Co.*, 70 Iowa, 704, 29 N. W. 411; *New Orleans Ins. Ass'n v. Matthews*, 65 Miss. 301, 4 South. 62; *Rockford Ins. Co. v. Travelstead*, 29 Ill. App. 654; *Smith v. Insurance Co.*, 47 Hun (N. Y.) 30; *Graves v. Insurance Co.*, 82 Iowa, 637, 49 N. W. 65; *Home Fire Ins. Co. of Omaha v. Hammang*, 44 Neb. 566, 62 N. W. 883.

²¹ *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865; *Lum v. Insurance Co.*, 104 Mich. 397, 62 N. W. 562.

There will be a waiver when one having authority has done or said something which has induced the insured to do, or to forbear doing, something whereby he is prejudiced. *Weidert v. Insurance Co.*, 19 Or. 261, 24 Pac. 242; *Harrison v. Insurance Co.*, 67 Fed. 577; *Baile v. Insurance Co.*, 73 Mo. 371, 10 Ins. Law J. 657; *Taylor v. Insurance Co.*, 9 How. 390; *Franklin Fire Ins. Co. of Philadelphia v. Coates*, 14 Md. 285; *Phoenix Ins. Co. v. Taylor*, 5 Minn.

fenses.²² But it has been held, with authority and reason, that, when liability is denied for any particular cause stated, there will be no waiver of defenses not mentioned, unless silence in regard to such defenses misleads the insured to his injury, causing him to do, or to omit doing, that which might have relieved the forfeiture, or placed him in a position of better advantage.²³

492 (Gil. 393); *McBride v. Insurance Co.*, 30 Wis. 562; *Home Ins. Co. v. Gaddis*, 10 Ins. Law J. 774.

Denial of liability is waiver of proofs. *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Caledonian Ins. Co. of Scotland v. Traub*, 80 Md. 214, 30 Atl. 904; *Hahn v. Assurance Co.*, 23 Or. 576, 32 Pac. 683; *Bloom v. Insurance Co. (Iowa)* 62 N. W. 810; *McCormick v. Insurance Co.*, 163 Pa. St. 184, 29 Atl. 747; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N. W. 877; *Faust v. Insurance Co.*, 91 Wis. 158, 64 N. W. 883.

Receiving proofs in silence, when they come too late, will be waiver of the default. *Purcell v. Insurance Co. (N. D.)* 64 N. W. 944.

But it was held that holding proofs 30 days was not waiver of the default. *Carey v. Insurance Co.*, 171 Pa. St. 204, 33 Atl. 185.

²² Any act on the part of insurer, recognizing the continued validity of the policy, after knowledge of a breach of its conditions, will estop insurer from defending on ground of such forfeitures. *Manufacturers' & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553.

Proofs waived by demanding arbitration. *Walker v. Insurance Co.*, 51 Kan. 725, 33 Pac. 597; *West Coast Lumber Co. v. State Inv. & Ins. Co.*, 98 Cal. 502, 33 Pac. 258; *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475; *David v. Insurance Co.*, 11 Wash. 181, 39 Pac. 443; *McKinney v. Insurance Co.*, 89 Wis. 653, 62 N. W. 413; *Doblantry v. Insurance Co.*, 83 Wis. 181, 53 N. W. 448.

Demand for examination under oath waiver of forfeiture. *Enos v. Insurance Co.*, 4 S. D. 639, 57 N. W. 919; *Kirkman v. Insurance Co.*, 90 Iowa, 457, 57 N. W. 952.

Proofs were served too late and were defective. The company asked that they be corrected. In doing this it waived the default in respect to time. *Merchants' Ins. Co. of Newark v. Gibbs*, 56 N. J. Law, 679, 29 Atl. 485.

Demand for arbitration waiver of forfeiture. *Eagle Fire Co. of New York v. Globe Loan & Trust Co.*, 44 Neb. 380, 62 N. W. 895; *Home Fire Ins. Co. v. Kennedy (Neb.)* 66 N. W. 278.

²³ *Welsh v. Assurance Corp.*, 151 Pa. St. 607, 25 Atl. 142.

Suggesting to insured, after a fire, that he put his stock in order, separating the damaged goods from the undamaged, is not a waiver of defenses of which company had knowledge. *Labell v. Insurance Co. (Tex. Civ. App.)* 28 S. W. 133.

There was a default in regard to notice. Proofs were served, and liability

When, after the occurrence of a fire, the insurer requires of the insured that he furnish information which the insurer knows it is impossible for him to produce, and distinctly notifies him that no proofs will be satisfactory without such information, it is equivalent to denying liability, and the insured will be absolved from any further duty in respect to proofs of loss.²⁴

§ 230. When Time for Filing Proofs will be Extended.

When the insured is required to furnish, as a part of amended or supplemental proofs, information concerning any fact, or to perform any particular thing, which by the terms of the policy it was not made his duty to furnish or to perform in the first instance, or without being specially requested to do so, he will be entitled to a reasonable extension of the time mentioned in the policy to perform the additional requirements.²⁵

denied, without giving reason. Held, that there was no waiver of forfeiture, on account of the default in respect to notice. *Ermentraut v. Insurance Co.* (Minn.) 65 N. W. 635.

Mere silence in regard to furnishing proofs is not to be taken as a waiver. To constitute waiver, the insurer must say or do something from which the insured might reasonably suppose that proofs would not be required. *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606.

²⁴ *Phoenix Ins. Co. v. Center* (Tex. Civ. App.) 31 S. W. 446.

²⁵ The policy required proofs to be filed within 60 days after the occurrence of the fire. They were served only a few days before the expiration of the time, and there was no magistrate's certificate attached. This, by the terms of the policy, insured was not compelled to furnish, unless specially requested to do so. The proofs were defective in many important respects, all of which were pointed out with careful particularity, and the request made that they be amended, and that a magistrate's certificate be furnished. The court was of the opinion that, as the demand for corrected proofs was coupled with a request for magistrate's certificate, something which insured was not obliged to procure unless particularly required to do so, compliance imported a grant of further time within which the amended or supplemental proof could be served. *McCarvel v. Insurance Co.* (Minn.) 66 N. W. 367.

§ 231. The Question as to Sufficiency of Proofs will Generally be for the Court.

The question as to whether proofs are sufficient will usually be for the court. If there be questions of fact, such as whether particular statements were made, papers filed, or acts performed, the jury must decide; but the value and significance of the statements, papers, and acts performed will always be questions for the court. So, too, when there is no dispute concerning the facts, or if the evidence consists of books and papers, on the value and interpretation of which depends the decision, it will be a matter for the court.²⁶

§ 232. Magistrates' Certificates.

In all the changes that have occurred in the evolution of the insurance contract, the provision in regard to a magistrate's certificate, as a part of the preliminary proofs of loss, has, in slightly vary-

²⁶ The court will decide whether the proofs are sufficient. *Commonwealth Ins. Co. v. Sennett*, 41 Pa. St. 161; *Heusinkveld v. Insurance Co. (Iowa)* 64 N. W. 769; *Phoenix Ins. Co. v. Center* (Tex. Civ. App.) 31 S. W. 446; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698.

As to whether there has been diligence, if the facts are undisputed, will be a question for the court. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Humboldt Fire Ins. Co. v. Mears*, 1 Penny. (Pa.) 513, 11 Ins. Law J. 847.

It will be for the jury to consider circumstances affecting delay, and the possibility of performance. *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. St. 350; *Davis v. Insurance Co.*, 8 R. I. 277; *Clark v. Insurance Co.*, 36 Cal. 168; *Brink v. Insurance Co.*, 80 N. Y. 108; *Continental Ins. Co. v. Lippold*, 3 Neb. 391, 4 Ins. Law J. 430; *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 89; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342; *O'Brien v. Insurance Co.*, 76 N. Y. 459; *Home Ins. Co. v. Davis*, 98 Pa. St. 280, 10 Ins. Law J. 754; *Phenix Ins. Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353, and 17 Ill. App. 248.

If any evidence tending to show waiver, the case will be for the jury. *Thierolf v. Insurance Co.*, 110 Pa. St. 37, 20 Atl. 412, and 14 Ins. Law J. 923.

From the nature of the questions presented, and the circumstances with which they are complicated, the sufficiency of proofs, and the reasonableness of the time within which they are furnished, will be matters of both fact and law, to be submitted to the jury under proper instructions. *American Fire Ins. Co. v. Hazen*, 110 Pa. St. 530, 1 Atl. 605; *Swan v. Liverpool, London & Globe Ins. Co.*, 52 Miss. 704.

ing form, held its place. The importance of this requirement, which was recognized in the first instance, still continues, and is even more apparent now than when the insurance business was in its infantile state. Under a wide-extending agency system, it has become practically impossible for an insurance company to know its patrons personally, and when a loss occurs it is compelled to rely upon the "best citizens" in the immediate locality for much important information in regard to the origin of the fire, and for certain guaranties of good faith on the part of the claimant. Certain officers have, therefore, been designated in the policy, whose certificate must be furnished as to the amount of the loss, and that the officer certifying believes that it occurred without "fraud and evil practice." The purpose of this requirement has been to protect the insurer against wrong-doing by direct appeal to the candor and fair-mindedness of some reputable person who is acquainted with the claimant, not interested in the loss, and who can with little trouble inquire into the circumstances of the fire, and give additional credit to the statements of the assured by adding thereto the weight of his personal and official character. Or, if the claim be without merit, then the provision will operate to defeat fraud, and save the insurer from becoming the victim of an atrocious crime. The persons designated to make this certificate, in the early forms of the insurance contract, were usually clergymen or churchwardens. Persons occupying these positions could be conveniently found. Their relations to the church and society implied that they were possessed of both the intelligence and moral character fitting them to form correct opinions, and to decide fairly in respect to these matters. Later on, the local magistrate and the notary public were substituted for the clergymen and churchwardens. This change has been the result of the subordination of the ecclesiastical to the civil authorities, and the better confidence which has come to exist in the latter concerning practical matters of business. The clergyman is no longer a man of affairs. The magistrate and the notary are. They are persons, too, who have been appointed, because of their good character and recognized ability, to investigate complicated matters, and to decide with discretion and fairness between their fellow men.

§ 233. The Condition in Regard to Magistrate's Certificate is Reasonable, and will be Enforced.

In a business like that of fire insurance, where its beneficial results depend so much upon conscience and good faith, the condition referred to has its important uses in preventing arson, increasing the security of property, and saving public morals. In the state of Indiana it is forbidden by statute to insert in the policy any condition requiring the insured to attach to his proofs a magistrate's certificate. Elsewhere the condition is valid, and enforced by the courts.

In the case of *Universal Fire Ins. Co. v. Block*²⁷ the policy provided that the certificate of the fire marshal must be obtained as to the amount of loss and the good faith of claimant. This was not done, and the court said: "The company have no right to require a public officer to act in the adjustment of its risks, and the neglect of the assured to even ask a certificate from that officer would have been no default." So far as my investigations have gone, this Pennsylvania case stands alone in denying the competency of parties to create by contract a condition of this kind, on which the performance of the principal obligation should depend. Mr. Wood in his work on *Fire Insurance*, referring to this case, says: "Upon the same principle, it seems to us that the insured may be absolved from the production of the certificate of a magistrate, minister, etc., as to the nature and bona fides of the loss, although, as will be seen in the cases referred to in this section, the courts hold otherwise." Unless there has been waiver, there must be a literal compliance with this requirement, or the company will be discharged.

Since the foregoing was written, the supreme court of Pennsylvania has handed down a decision in *Kelly v. Sun Fire Office*,²⁸ over-

²⁷ 109 Pa. St. 535, 1 Atl. 523; *Aetna Ins. Co. v. People's Bank*, 10 C. C. A. 342, 62 Fed. 222. The leading authorities are: *Kerr v. Assur. Co.*, 32 U. C. Q. B. 569; *Cayon v. Insurance Co.*, 68 Wis. 510, 32 N. W. 540; *Morrow v. Insurance Co.*, 39 U. C. Q. B. 441; *Campbell v. Insurance Co.*, 1 MacArthur, 246; *Johnson v. Insurance Co.*, 112 Mass. 49; *Roumage v. Insurance Co.*, 13 N. J. Law, 110; *Wood, Ins.* §§ 416, 713; *Columbia Ins. Co. v. Lawrence*, 2 Pet. 25; *Id.*, 10 Pet. 507.

²⁸ 141 Pa. St. 10, 21 Atl. 447.

ruling its former decisions in the case of *Universal Fire Ins. Co. v. Block*,²⁹ and *Davis Shoe Co. v. Kittanning Ins. Co.*³⁰ Paxson, C. J., said: "We do not think it was error to say that an insurance company 'had no right to require a public officer to act in the adjustment of its risks.' No such officer could be compelled to do so. This is plain enough. It does not follow that the parties to a policy of insurance may not contract that the insured shall procure a certificate from the nearest magistrate, notary, or other officer. Such contract is not forbidden by any law or rule of public policy."

In support of this proposition the court then cites a large number of cases. Then, again, referring to *Universal Fire Ins. Co. v. Block* and *Davis Shoe Co. v. Kittanning Ins. Co.*,³¹ it adds: "The dictum of these cases must give way before such an unbroken line of decisions."

With this change in the attitude of the Pennsylvania court, which the chief justice explains is the result of resolving the nebulosities of a former decision, there are now no courts known to us which dispute the validity of that clause, contained in all policies of insurance, requiring the insured to furnish a magistrate's certificate as a part of his proofs of loss.

§ 234. Magistrate's Certificate should be Upheld from Considerations of Public Morality.

While the courts will often give a strained interpretation to contracts to prevent forfeitures, they can generally be relied upon to exercise a wise and just discretion for the protection of property and the conservation of public morals. Arbitrary provisions of a contract and the insistence on technical rights are seldom regarded with favor; and, when these are employed to defeat justice, judicial ingenuity is sometimes taxed to its utmost to prevent such application of legal principles as will give advantage to cunning and trickery. The stipulation in the insurance policy concerning magistrate's certificate has found support in the courts because of its apparent necessity as a bar against a class of frauds that are easily perpetrated, and which, were it not for the restraining fear of the

²⁹ 109 Pa. St. 535, 1 Atl. 523. ³⁰ 138 Pa. St. 73, 20 Atl. 838. ³¹ *Supra*.

honest scrutiny of the "nearest magistrate," might become so numerous and so flagrant as to seriously affect the security of property, and defeat the best efforts of the civil authorities to suppress a species of crime that is generally difficult to prove, and often committed under the stimulus of a great temptation. While the average man may, perhaps, be trusted to act in business matters from considerations of justice, there is undisputedly a very large element in society that is still

* * * "None too good
For human nature's daily food."

It is because of those who, by violence or fraud appropriate the fruits of labor they have never earned, who are a constant menace to the peace and security of honest people, that laws are enacted and courts organized to restrain and punish. The magistrate is a "select man." He has been chosen to perform the duties of an honorable and responsible office because of exceptional traits of mind and character, that fit him to discern and judge. His appointment presumes firmness and moral integrity. He is a pillar of society, a bulwark of the law, and can be relied upon to investigate loss claims with fairness, and to render to the honest and unfortunate claimant any service that will not compromise his personal and official character. It is not the good citizen, but the bad one, who objects to the scrutiny of the "nearest magistrate," and it is fair to assume that many carefully prepared schemes of incendiarism have been abandoned from an apprehension that its fruits would be lost through the veto power of the magistrate, incorporated into the insurance contract. Out of this provision of the policy proceeds a moral force which works in the direction of improved social conditions. The evil doer is incumbered with limitations and restrictions that in nowise embarrass the action of the upright man. The requirement of a magistrate's certificate is not only a proper subject of contract, and as such is upheld by the courts, but it is so clearly in the interests of public morals that it may well be doubted whether insurers should not be forbidden by law to pay losses without the official sanction and indorsement of a magistrate or other officer, whose duties and position distinguish him as a person entitled to the fullest confidence, and who should in all cases be required to make careful investigations into the origin of fires. While the courts have upheld

the "condition" in regard to the magistrate's certificate with such uniform agreement as to leave no doubt as to its validity, there has been found in particular cases some difficulty in its application.

§ 235. Who is a Magistrate.

The supreme court of Wisconsin was called to consider what officer might be properly designated as a "magistrate." In that case ³² the certificate furnished with the proofs was satisfactory in form and substance, but was signed by a "notary public" instead of "magistrate." Judge Orton, of the supreme court of Wisconsin, said: "The fact that the officer must be a magistrate nearest the place of the fire would seem to indicate that a justice of the peace was the officer intended, for his office and place of business are local and fixed, and he is one of a class of magistrates. * * * The president of the United States and the governors of the states are called 'magistrates.' They, of course, are not intended. One thing is very certain, a notary public is not a magistrate. It follows, therefore, that the proofs of loss in this case had not the proper certificate of a magistrate annexed to it, as required by the policy."

§ 236. It is the Nearest Magistrate or Notary Public Whose Certificate must be Furnished.

Many policies provide for the certificate of the "nearest magistrate or notary public." In such cases the one nearest the place of the fire, whether it be a magistrate or notary public, must make this certificate. The insured can have no option in selecting. The "nearest" is the one required. The intention of the contract was obviously to take away the right of choice, and this for excellent reasons. The one nearest to the place of the fire, unless there are two or more of equal distance, which will seldom be the case, fixes definitely the person who shall certify. The nearest, too, will be fairly presumed to have better opportunities to obtain information on which to base his judgment concerning the character and extent of the loss; but, more important still, in order to prevent collu-

³² Cayon v. Insurance Co., 68 Wis. 510, 32 N. W. 540.
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sion and secure absolute fairness, neither the insured nor insurer should have the privilege of selection. If the claimant is a good citizen and an honest man, the chances are largely that the nearest magistrate or notary public will be a personal friend, and that his investigations concerning the cause of the fire and the estimate of the loss will be affected by his sympathy and neighborly interest in the claimant. This abuse of official prerogative, if abuse it may be called, no doubt frequently occurs, but a remedy is not easily found. The same difficulty is everywhere experienced in courts of law. Justice is represented to us as blindfolded, but the judge on the bench and the jury in the box are seldom able to wholly subordinate to duty their choice between friends and strangers. They go to the court room with warm sympathies, stimulated, perhaps, with the recollection of favors received. These cannot always be put aside with the overcoat and cane, to be taken on again after the judgment and verdict are entered. The certificate of the magistrate or notary must set forth that he has inquired into the circumstances of the loss, and that he believes the insured has sustained damage to the amount stated.

In *Campbell v. American Popular Life Ins. Co.*³³ the policy contained a provision "that the claimant shall produce a certificate that, in the opinion of the surgeon in chief of this company, the party insured did not die of intemperance." The court held that the stipulation was valid, and that the plaintiff could not recover without producing the certificate, or showing a proper excuse for not doing so. This decision recognizes a freedom in contracting that reaches beyond a point where a doubt is suggested whether limitations ought not to be imposed. Had this declaration of the law emanated from a court of less dignity and learning, we should be disposed to question its correctness.

The case of *Williams v. Queen's Ins. Co.*³⁴ contains an interesting discussion of the principal points under consideration. That part of the condition of the Queen policy necessary for an understanding of the matter read: "The insured must produce the certificate of a magistrate or notary public nearest the place of the fire," etc. The insured sent in as a part of his proofs a certificate of the nearest

³³ 1 MacArthur, 246.

³⁴ 39 Fed. 167, 19 Ins. Law J. 26.

magistrate, but it was shown on the trial of the case that there were at least two disinterested notaries who were materially nearer to the property burned. The court construed the condition to mean that the certificate must be produced of the nearest officer, whether it be a magistrate or notary public; that the insured had no option in the matter; that the word "nearest" controlled the selection. I quote from the opinion of Judge Shipman: "The object to be effected by this old and familiar provision of fire policies was to obtain the opinion of an unbiased public officer, who, from his location, might be presumed to have the most intimate knowledge of the assured, or the origin of the fire, and the amount of the loss. It would be a strange construction to hold that, when three classes of officers are named, as is now frequently the case, the assured has the privilege of selecting the nearest member of one of these classes, although qualified members of each of the other classes are nearer to the place of the fire."

§ 237. The Magistrate must be Disinterested.

In *Wright v. Hartford Fire Ins. Co.*³⁵ the policy stipulated in the usual form that the certificate should be produced of the nearest magistrate or notary public not concerned in the loss. The evidence showed that the nearest magistrate was one Hull, but the court held that he was not competent to make the certificate, for the reason that he was an interested party. It was in proof that Hull owned property contiguous to that owned by the plaintiff, Wright, insured under the policy of the defendant company; that Hull's property was injured by the fire, on account of which the plaintiff had sustained loss, and for the recovery of which the action was brought. Hull had made a complaint against Wright, charging him with the crime of setting the fire. The court said: "If the plaintiff willfully set the fire which destroyed his property, the defendant company is not liable for his loss, but he is liable to Mr. Hull for the loss of the latter caused by the same fire. Had Mr. Hull made the certificate required by the policy, it would have been strong, almost conclusive, evidence against his right to recover for his loss in an action therefor against the plaintiff. Hence he had an interest in

³⁵ 36 Wis. 522, 4 Ins. Law J. 251.

withholding the certificate, and in establishing the fact that the plaintiff willfully set the fire." The court was of the opinion, therefore, that Wright was excused from producing the certificate of the magistrate nearest the fire, he being "concerned in the loss," and that furnishing the certificate of another magistrate was in compliance with the condition of the policy. The reasoning of the court clearly indicates that the arbitrary refusal of Mr. Hull would not have excused performance and saved the forfeitures. It was because Mr. Hull was an interested party, and therefore disqualified, that the certificate of another magistrate further away could be offered in compliance.

§ 238. When Notice or Proofs are Sent by Mail.

When notice or proofs are required to be furnished the insurer, as is usually the case, within some specified time, without a substantial performance of the requirement the insurer will be relieved from payment of the loss. The notice or proofs may be forwarded to the company in any manner that will be most convenient to the insured, but it is incumbent upon him to be certain that they reach the insurer, or the hands of some one having authority to receive them. If the insured intrusts them to the carriage of the mails, he assumes all risk of their being lost, or of their failing to reach their destination within the prescribed time. The burden of performance is upon the insured, while the company has no responsibility in the matter. The question of ways and means is one alone for the former to consider. The mailing of the notice or proofs is not sufficient, unless it is shown that they are received by the company. The post in such a case becomes the agent of the sender and not of the receiver. The case is in no sense different from what it would be if the papers were sent by a special messenger and lost on the way.

This question was discussed in *British & American Tel. Co. v. Colson*.³⁶ The contention there referred to the purchase of shares of stock, concerning which notice had been sent by post, and not received by the party to whom it was addressed. Baron Bramwell said: "To hold, therefore, that the plaintiffs are right, it seems to

me that we must lay it down as a general proposition that in cases where the post may be used, wherever a person posts a letter, he does that which is equivalent to delivering it to the person to whom it is directed, so that, if an offer is made by letter, and the letter is posted, accepting it, the offerer is bound; that if a man orders his broker to buy stock or shares, and hold them to the orders of the principal, and the principal posts a letter ordering the broker to sell, the broker not selling would be liable to damages, though the letter never reached him. So, of a warehouseman bound to forward goods on an order from the owner; so, of a notice to quit; so, if a man proposes marriage, and the woman was to consult her friends, and let him know, would it be enough if she wrote and posted a letter which never reached him? I put this case not to raise a smile, but to show an extravagant consequence of such a rule. In all the cases I have put, it would be extremely hard to make liable the person who had never received the letter. It would be wholly unjust and unreasonable. It may be said that it would be hard to leave the sender of the letter without remedy, but there is this to be said: The sender of the letter need not use the public post. If he does, he may guard against mistakes by sending two letters, or requiring an answer and sending another on nonreceipt of the answer, or by taking other steps to ascertain the arrival or nonarrival of the letter, and to remedy the mischief of the latter event. But the person to whom it is addressed can do absolutely nothing, for by the hypothesis he does not know it has been sent. When these considerations are borne in mind, when it is remembered that it is open to the sender to adopt other means of sending, when it is certain that if he does he is responsible for the due arrival of the letter, it seems to me right to hold that, as a rule, the post is the agent of the sender of a letter, and that the delivery of a letter to the post, not followed by delivery by the post to the person to whom it is sent, is no delivery to the latter, and has no more effect than if the letter had been given to the hand of a messenger and not delivered, or had been kept in the pocket of the sender."

Evidence that "proofs" were properly addressed to the insurer, stamped and mailed, raises a presumption that they were received in due course; but this presumption will be overcome by direct and positive testimony on the part of the insurer that the papers were

not so received. Should the plaintiff in a suit, where the defense is that proofs were not received, produce evidence that the proofs were properly mailed, but give no further support to the presumption that they were received, and the defendant show, by evidence in no way qualified or discredited, that the proofs were not received, there would be no conflict in the evidence, as it had been given in respect to different facts,—on one side in reference to the sending, and on the other in reference to the receiving. While the presumption is something for the jury to consider, and the matter may, perhaps, properly be submitted to them without instructions, should, in such a case, the jury find that the notice or proofs were received, when the unsupported presumption or inference was rebutted by direct and undiscredited evidence, it would be the duty of the court to set aside the verdict as being contrary to the evidence.

This proposition appears to be sustained by the courts in New York and Minnesota, in *Hodgkins v. Montgomery Co. Mut. Ins. Co.* and in *Plath v. Insurance Co.*³⁷

In the case last referred to, the by-laws and policy required a written notice of the mortgage to be given by the insured to the secretary of the association, and it was held, though the sending of such notice in the usual manner by mail was sufficient to raise a presumption that it was received by the secretary by due course of mail, it was not conclusive, but could be rebutted by proof of the fact that it was not received. The obligation of the insured was to give the desired information, and, if he adopted any other than personal service, the risk was his.

In *Hodgkins v. Montgomery Co. Mut. Ins. Co.*, *supra*, the policy stipulated that the insured should "deliver in" to the company a particular statement of the loss, and on the trial of the case it was in proof that the insured did deposit in the post office the required statement, properly addressed and stamped, but the court held that this was not a sufficient compliance with the conditions of the policy.

This question was before the supreme court of Alabama in the case of *Central City Ins. Co. v. Oates*.³⁸ We quote from the opin-

³⁷ 34 Barb. 213; 23 Minn. 479, 6 Ins. Law J. 595.

³⁸ 86 Ala. 558, 6 South. 83, and 18 Ins. Law J. 761.

ion filed in the case: "The policy required that proofs should be rendered to the company, meaning, from the context, in the city of Selma, where the notice was required to be given. The deposit in the post office of a written statement of loss, made out and sworn to, and addressed to the company at Selma, but never received by them, was not a delivery of such proofs to them, and could not operate to fulfill the requirements of the contract that such proofs of loss should be rendered to the company at Selma."

The case of *Pennypacker v. Capital Ins. Co.*³⁹ does not appear to support the conclusions reached by the courts of New York, Alabama, and Minnesota in the cases here referred to. However, as the condition of the policy in that suit, requiring that proofs be rendered, does not appear in the opinion of the court or in the statement of the case furnished in that connection, we may fairly suppose that it differed in some important particular from the usual requirements. This inference seems to be justified by the reasoning of the court, and more especially by the remark of Judge Given, who wrote the opinion, on page 410, that the case of *Hodgkins v. Montgomery Co. Mut. Ins. Co.*⁴⁰ was not in point, as that case turned upon a provision of the policy differently expressed.

May⁴¹ states the law to be: "Sending notice of loss by mail, properly addressed, is *prima facie* evidence of service, and, in the absence of denial, the jury may find that it was received,"—citing, in support of the proposition, *Central City Ins. Co. v. Oates*, *supra*.

In accepting this principle of construction, the courts are relieved from strained interpretations, and no hardship results to the insured. If he finds it less expensive or more convenient to send his proofs by the post, the government has provided facilities by which he may do so by registration. When that means of transmission is adopted, he will be left in no doubt as to whether his communications have reached safely their destination. It appears reasonable, therefore, if he neglects to avail himself of so inexpensive a precaution, that "substantial justice will be done" when he is held to a strict performance of his contract in furnishing notice and proofs of loss, and to take all the chances of a safe transmission by mail.

³⁹ 80 Iowa, 56, 45 N. W. 408.

⁴⁰ 34 Barb. 213.

⁴¹ Section 461.

Lawson on Presumptive Evidence ⁴² says: "By no law in the United States, or of the states, is the post made a legal channel of communication which a party may adopt and make compulsory upon his correspondent." And while the same writer affirms that evidence of mailing raises a presumption of receiving, he states it as a rule that "a presumption cannot contradict facts or overcome facts proved." This must, of course, be understood to apply only to presumptions of fact. Legal presumptions, being sometimes irrebuttable, deriving their force from jurisprudence, are always arbitrary in their character. In this respect there is a wide distinction between the inherent nature and probative force of presumptions of law and of fact. Of the latter, Lawson says:⁴³ "They are said to be but mere argument, of which the major premise is not a rule of law, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. Juries, in inferring one fact from others which have been established, do nothing more than apply, under the sanction of the law, a process of reasoning, the force of which rests on experience and observation, and such influences are presumptions of fact."

In the case of *Huntley v. Whittier* ⁴⁴ it was held that the mailing of a letter was not conclusive that it had been received. The court said: "The presumption so arising is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty in the usual course of business, and, when it is opposed by evidence that the letter was never received, must be weighed, with all the other circumstances of the case, by the jury, in determining the question whether the letter was actually received or not, and the burden of proving its receipt remains, throughout, upon the party who asserts it." ⁴⁵

§ 239. Reasonable Time.

Often, in the trial of insurance cases, it is found that great importance attaches to the time of performance, and what is sufficient

⁴² Page 561.

⁴³ Page 558.

⁴⁴ 105 Mass. 391.

⁴⁵ See, also, *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Austin v. Holland*, 69 N. Y. 571; *Wade*, Notice, § 501; *Whart. Ev.* § 1325; 13 *Am. & Eng. Enc. Law*, p. 260; *Briggs v. Hervey*, 130 Mass. 186.

in that respect will usually be a mixed question of law and fact, partly to be determined by the court, and partly by the jury, or, as in practice it will most frequently occur, the jury will be required to find, under appropriate instructions from the court. The province of the jury in civil cases is to ascertain facts. As said by Judge Selden: "The selection of jurors from all classes of the people, whose education and business have not as a general rule qualified them to decide legal questions, renders it unreasonable, as well as apparently unsafe, to require them to pass upon such questions. If jurors were to determine the law, its stability would be subverted, and it would become as variable as the prejudices, the inclinations, and the passions of men."

When some act is performed within a "reasonable time," the time of performance will be a question of fact, but the reasonableness of the time will be a question of law. May on Insurance ⁴⁶ says: "The company must object to the proofs within a reasonable time, and what is a reasonable time, being a mixed question of law and fact, should be given to the jury under proper instructions."

See, also, Wood,⁴⁷ who states the rule to be that "as to what is a reasonable time for a fire insurance company to make known its dissatisfaction with proofs of loss furnished is a question of law for the court."

In *Mispelhorn v. Farmers' Fire Ins. Co.*⁴⁸ the question was before the court as to the correctness of submitting to the jury what was a reasonable time in which the defendant company might object to proofs and demand invoices, etc. Justice Alvey, speaking for the court, said: "This is not a question of fact, to be submitted to the jury. It is a question of law, involved in the legal construction of the policy; and it was therefore for the court to determine, upon facts to be found by the jury, whether the demand for bills or duplicates was made within a reasonable time or not."⁴⁹

In cases of this kind, the question of what is reasonable time refers not to matters of inquiry within the purview of a jury. Considerations are involved that call into exercise faculties that have been trained in a larger knowledge, and possess a mental skill and power,

⁴⁶ Section 469b.

⁴⁸ 53 Md. 473.

⁴⁷ Volume 2, p. 953.

⁴⁹ *Insurance Cos. v. Weides*, 14 Wall. 375.

on which we are accustomed to rely in reaching conclusions that affect valuable personal rights. The average juror has not the preparation that fits him for judgment in respect to questions of so much difficulty. Mr. Justice Story once said: "If the jury were at liberty to settle the law for themselves, the effect would be not only that the law itself would be most uncertain, from the different views which juries might take of it, but, in case of error, there would be no remedy or redress of the injured party, for the court would not have any right to review the law, as it has been settled by the jury."

The Alabama court, in *Fire Ins. Cos. v. Felrath*,⁵⁰ had under consideration the question of time within which the preliminary proofs of loss must be filed, and, after stating the duty of the insured, the court said: "What is a reasonable time, being a mixed question of law and fact, must be submitted to the jury with appropriate instructions; and, when the testimony is not clear and free from conflict on material points, a general charge in favor of either party is an invasion of the province of the jury."

The United States circuit court of appeals, in *Hamilton v. Phoenix Ins. Co.*,⁵¹ carefully reviewed many of the authorities referring to the question here considered, and declared its opinion to be that, when the circumstances were such that no doubt could exist in the mind of an intelligent court as to the reasonableness of the time, the question of reasonableness became one of law, but that, when the facts in evidence disclose that the reasonableness of the time must be determined in respect to a variety of more or less abstruse and difficult considerations, then the matter is one for the jury.

While the reasoning of the court is not quite apparent, the profundity of its conclusions seems to be on a parity with the proposition that wisdom proceeds from the "mouths of babes and sucklings." It involves the absurd and mortifying inference that our jurisprudence rests on the basic fact that juries are wiser than judges; that the unlearned citizen, called from his manual and humble employment to serve as a juror, has an astuteness of perception and a capability of reaching a conclusion by purely inductive methods, which the recondite courts, skilled in logic and learned in the law, do not possess.

⁵⁰ 77 Ala. 194.

⁵¹ 9 C. C. A. 530, 61 Fed. 379.

It was held by the supreme court of Indiana, in *Pickel v. Phenix Ins. Co.*,⁵² "where the facts constituting diligence are in dispute, what is a reasonable time is a question for the jury, under proper instructions of the court, and, when the facts are not in dispute, what constitutes a reasonable time is a question of law for the court."

So, too, in *Bennett v. Lycoming Co. Mut. Ins. Co.*,⁵³ where the court said: "The sole question was whether the notice was served in a reasonable time, and, the facts being undisputed, that was a question of law which the judge should have determined in favor of the plaintiff."⁵⁴

It does not seem a matter of great difficulty to discover the elements of that judgment which a court is called to exercise concerning a question of this character. The fact having been definitely ascertained by the jury as to the time of performance, it is left for the court to do one of two things,—either to construe the contract in reference to such time, or to apply such general principles of law as are fundamental and always available to uphold justice, when judgment is free from special limitations, such as arise from the terms of the contract or from statutory law.

In considering these propositions, let us suppose, for the purpose of better illustration, that the policy stipulated notice must be given within a "reasonable time," and that the jury had found the actual time of the service of the notice was 20 days after the fire. The next step, then, in the adjudication, is to ascertain whether the notice at the expiration of 20 days was sufficient. To do this a construction of the language "reasonable time" becomes necessary. What was within the contemplation of the parties when these words were used is a question which only the court can determine. The construction of a contract is never the province of a jury.

Again, the facts being found by the jury that performance had been made in 20 days, whose duty or privilege is it to so properly analyze and correlate the facts and interests involved, in a manner consistent with the policy stipulation, that justice, which is the soul and body of law, shall be preserved? If this is not a judicial function, it is difficult to define one. In this process, which calls for the

⁵² 119 Ind. 291, 21 N. E. 898.

⁵³ 67 N. Y. 274.

⁵⁴ *Hedges v. Railroad Co.*, 49 N. Y. 223; *Roth v. Railroad Co.*, 34 N. Y. 548.

knowledge and trained faculties of a jurist, judgment only is sought, and nothing else is possible. In any case, it will be that of either the court or the jury.

§ 240. When the Time for Filing Proofs Expires on Sunday.

The fire insurance policy requires, in most cases, that proofs of loss be furnished within a stipulated time, as 30 or 60 days after the occurrence of the loss. When the policy so provides, the insured is entitled to the full term stated in which to prepare and serve his proofs, and, if the last day falls on Sunday, there will be no default should performance be made on the Monday following.

In several of the states this question has been taken out of controversy by statutory enactments. Elsewhere there has been some difference of opinion among the courts as to the proper rule of law. It is well established, in the case of commercial paper, where "grace" suspends payment three days beyond the stipulated time, and when the note or draft matures on Sunday, the indulgence by grace will be shortened one day, and payment be required on Saturday; but, in regard to all other classes of contracts, the courts generally have refused to sanction any limitation of the time within which performance can be made.

This question was settled in Connecticut as early as 1816, in the case of *Avery v. Stewart*.⁵⁵ At that time the laws of Connecticut required a very strict observance of Sunday as a religious institution. In regard to all secular matters it was made, both by law and general usage, "dies non." In deciding the case of *Avery v. Stewart*, the court reasoned that, as the statute forbade all manner of work on Sunday, imposing severe penalties for violations, the performance of a contract on that day became impossible. The obligor was excused, the day for all business purposes treated as a nullity, and the succeeding Monday counted in its stead.

Later this same doctrine was recognized and established in New York.⁵⁶ In *Stebbins v. Leowolf* ⁵⁷ the court said: "The law of the

⁵⁵ 2 Conn. 69.

⁵⁶ *Salter v. Burt*, 20 Wend. 205; *Stebbins v. Leowolf*, 3 Cush. 137.

⁵⁷ *Supra*.

state of New York upon this point has become well settled. In the case of *Salter v. Burt* it was held: 'When the day of the performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and a compliance with the stipulation of the contract on the next day (Monday) is deemed in law a performance.'

In *Post v. Garrow*⁵⁸ the court was called to decide whether a contract to deliver certain cattle on a particular day of the month, which chanced to fall on Sunday, could be performed on the following Monday. The court, in handing down its opinion, referred to *Avery v. Stewart*, and adopted as its own the language of Gould, J., who said: "As Sunday cannot, for the purpose of performing contracts, be regarded as a day in law, it is as to that purpose to be considered as stricken from the calendar, though intervening Sundays are doubtless to be counted, as in all other computations of time, because they are not appointed for the performance of any act. And this rule applies to all contracts except those where, under the statute or the law merchant, days of grace are allowed."⁵⁹

In the absence, therefore, of any statutory provisions establishing a rule, the one, I think, laid down by the Connecticut court in *Avery v. Stewart*, will generally be recognized as a proper one to follow, and the provision in the insurance policy, requiring proofs within a specified time, will be held to be complied with if the proofs are served on Monday, the last day for performance falling on Sunday.

§ 241. Conclusions.

When the policy provides that immediate notice of a loss shall be given in writing, any unreasonable delay will not be excused, and it will generally be perilous for the insured to rely on any other manner of notice than that to which the parties have agreed.

In the absence of any special requirement of the policy, it will be the duty of a claimant to prove his loss. The condition in respect to the presentation of "proofs" is one of great urgency and importance; and substantial performance, unless excused by the insurer, is precedent to the payment of a loss.

When the policy provides that proofs shall be furnished "forth-

⁵⁸ 18 Neb. 682, 26 N. W. 580.

⁵⁹ 5 Am. & Eng. Enc. Law, 85.

with," it is construed to mean that proofs shall be filed "as soon after the loss as possible." If the language of the policy makes it a condition precedent that the proofs shall be served within a specified time, there will be no room for construction, and without literal compliance the insurer will be discharged.

If the proofs offered the insurer are regarded by him as incomplete and unsatisfactory, it will be his duty, acting with reasonable diligence, to inform the insured with particularity wherein they are deficient. Silence will be understood as approval, and estop the insurer from afterwards invoking a forfeiture.

When the insurer, having knowledge of breaches of warranty, or other acts or omissions of the insured that have caused a technical forfeiture, demands proofs of loss, or requires the insured to perform in any other respect, it will be construed as a recognition of continued liability on the part of the insurer, and a waiver of his right to declare a forfeiture.

Proofs must contain an intelligible statement of the cause and circumstances of the fire, the insured's interest in the property damaged or destroyed, where situated, and the nature and extent of the loss sustained. This statement must be verified by his affidavit.

No one will be presumed to have power to waive proofs, except such officers and agents of the insurer as have authority in respect to the adjustment of loss claims.

The insured will be excused from furnishing the stipulated proofs when the insurer denies all liability, and proofs will be deemed to be waived when the adjuster makes a full inquiry into the circumstances of the loss, carefully interrogates the claimant, examines books and invoices, computes the damage, and goes away without signifying his intention to return, or that further information concerning the loss is expected or desired.

When the insurer demands of the insured that he procure evidence, documentary or otherwise, of the loss claimed, which the insurer knows it is impossible to obtain, and states that no "proofs of loss" will be satisfactory without such evidence, it will be equivalent to denying liability, and the insured will be absolved from any further duty in respect to furnishing proofs of loss.

When the insured is required to furnish, as a part of amended or

supplemental proofs, information concerning any fact, or to perform any particular thing which, by the terms of the policy, it was not made his duty to furnish or perform in the first instance, or without being specially requested to do so, he will be entitled to a reasonable extension of the time mentioned in the policy to perform the additional requirements.

Where it is a condition of the policy that "notice" of the loss, or "proofs," shall be served within a specified time, as 10, 30, or 60 days, the insured will be entitled to the whole period stipulated for performance; but there will be no grace to extend the time, unless it shall happen that the last day on which the insured is required to act falls on Sunday, in which case there will be no default if performance is made on Monday following.

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CHAPTER XII.**OTHER INSURANCE.**

- § 242. Why the Amount of Insurance is Limited.
- 243. When Other Insurance will Avoid the Policy.
- 244. When Subsequent Insurance will Cause a Forfeiture.
- 245. When, in Case of Double Insurance, the Last Insurer is Discharged.
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- 250. Not Double Insurance unless Both Policies Protect the Same Interests.
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§ 242. Why the Amount of Insurance is Limited.

It is a matter of no less importance to the public than the insurer that the contract be framed in such a manner as not to invite moral hazards. The insurance policy has been carefully prepared so as to limit the risk assumed as nearly as possible to its purely physical circumstances. The questions of title, incumbrance, and additional insurance are chiefly important only as they affect the interest of the policy holder in protecting the property insured against accident. The insurance company bases its estimates of conduct on the well-understood fact that the average man is selfish, to the extent that he will be constant and reliable in his watchfulness when his property is in jeopardy, and that he will be indifferent and careless when he may be so without incurring the liability of loss. Few persons ever rise to a plane where their action is wholly independent of considerations of this character.

When property is insured to its full value, reliance cannot be placed on its receiving the fullest degree of care from its owner; and, when it is insured for a sum in excess of its value, there is always a temptation put before the owner to apply the torch, and

the danger line of the "moral hazard" is then reached. The average person may not be consciously influenced by these considerations; but the moral scientist knows, so does the intelligent underwriter, that in a majority of cases the best possible security is attained only when duty and honor are sustained and stimulated by personal interest. It is for this reason that all insurance contracts contain a provision that they will become void if other insurance is placed on the property covered without the company's consent, and generally it is expressed that this consent must be indorsed in writing upon the policy. The courts everywhere, and without dissent, have sustained such conditions as being founded in the necessities of the business, and useful to the interests of property and for the prevention of crime.

§ 243. When Other Insurance will Avoid the Policy.

When it is required by the terms of the policy that both prior and subsequent insurance must be disclosed to the company, and that, failing to do so, the insurer will not be liable for the loss, it has been generally held that where other insurance was existing at the time of the writing of the policy in suit, and was known to the agent of the company who wrote it, the insurer will be estopped from setting up such other insurance in a defense to a claim for loss, notwithstanding no notice and consent had been expressed in writing.¹ This has been held with great uniformity, in disregard of the stipulation in the policy that no agent of the company has authority to waive any of its conditions, except by distinct and specific agreement indorsed thereon. The courts appear to have based their decisions upon the equitable principle that the insurer, having accepted the premium with full knowledge of the other in-

¹ When agent has knowledge of additional insurance at time of writing policy, the condition in regard to forfeiture, "if there be other insurance," is waived. *First Nat. Bank of Devil's Lake v. American Cent. Ins. Co. of St. Louis*, 58 Minn. 492, 60 N. W. 345; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Hamilton v. Insurance Co.*, 94 Mo. 353, 7 S. W. 261; *Kings Co. Fire Ins. Co. v. Swigert*, 11 Ill. App. 590; *Key v. Insurance Co.*, 77 Iowa, 174, 41 N. W. 614; *National Mut. Fire Ins. Co. v. Barnes*, 41 Kan. 161, 21 Pac. 165; *Siltz v. Insurance Co.*, 71 Iowa, 710, 29 N. W. 605; *Myers v. Insurance Co.*, 72 Iowa, 176, 33 N. W. 453; *Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118.

insurance, ought not to be permitted to escape performance of the obligation it has assumed, and for which it has received the consideration demanded. If there be two or more policies in different companies covering on the same property, written at one time and by the same agent, although on neither of the policies is indorsed permission for additional insurance, neither of the companies will be discharged because of the other insurance. Knowledge of the agent will be imputed to the company, and that which the insurer knew when engaging in the venture it will be presumed to have consented to.²

§ 244. When Subsequent Insurance will Cause a Forfeiture.

A different rule applies after the insurance is consummated and the policy delivered. If, subsequently, other insurance is placed on the property, notice must be given to the first insurer, and its consent indorsed on the policy, if it is so required by its terms; otherwise, it will be relieved should a loss occur. The first policy being then in the hands of the insured, he is informed of its conditions, and of the limitations imposed on the authority of the agent to waive the prohibition in regard to other insurance, only by written indorsement.³ The courts have not always been in accord where the prior and subsequent insurance was written in different companies and by different agents, and neither had notice of and

² *Collins v. Insurance Co.*, 79 N. C. 280; *Billington v. Insurance Co.*, 3 Duv. (Can.) 182; *Brandup v. Insurance Co.*, 27 Minn. 393, 7 N. W. 735; *Putnam v. Insurance Co.*, 18 Blatchf. 368, 4 Fed. 753; *Bennett v. Insurance Co.*, 70 Iowa, 600, 31 N. W. 948; *Crescent Ins. Co. v. Griffin*, 59 Tex. 509; *Insurance Co. of North America v. McDowell*, 50 Ill. 120; *Miller v. Insurance Co.*, 70 Iowa, 704, 29 N. W. 411.

³ *Wilson v. Insurance Co.* (Tex. Civ. App.) 33 S. W. 1085.

Insurance companies may limit the amount of other policies. Such privilege is protective and wise. *Union Nat. Bank of Oshkosh v. German Ins. Co. of Freeport*, 18 C. C. A. 203, 71 Fed. 473; *East Texas Fire Ins. Co. v. Flippen*, 4 Tex. Civ. App. 576, 23 S. W. 550; *Donogh v. Insurance Co.*, 104 Mich. 503, 62 N. W. 721; *Hartford Fire Ins. Co. v. Small*, 14 C. C. A. 33, 66 Fed. 490.

Held, in Ohio, that a subsequent policy placed on the property increased the hazard. *Sun Fire Office of London v. Clark* (Ohio Sup.) 42 N. E. 248.

consented to the other policy. The weight of authority, however, is that the policy last written never attached when it contained the usual provision that the company must be informed of both prior and subsequent insurance; and, as the last written policy was void *ab initio*, the validity of the first policy would not be affected.⁴ In some cases it has been held that both policies were

⁴ Held that, first policy having been avoided on account of other insurance without notice, the last policy written was not entitled to contribution. *Forbush v. Insurance Co.*, 4 Gray (Mass.) 337.

The court, in *Sweeting v. Insurance Co.* (Md.) 34 Atl. 826, carefully collecting and reviewing all the cases in which this much disputed question has been discussed, said: "There is a wide diversity of opinion on this question in the various courts of this country. The doctrine laid down by the highest tribunals of Massachusetts, Pennsylvania, and other states is that the subsequent insurance being invalid at the time of loss, by reason of the breach of condition therein, the prior insurance is good, and the first underwriter is liable on the policy issued by it. *Thomas v. Insurance Co.*, 119 Mass. 121; *Allison v. Insurance Co.*, 3 Dill. 480, Fed. Cas. No. 252; *Fireman's Ins. Co. of Dayton v. Holt*, 35 Ohio St. 189; *Knight v. Insurance Co.*, 26 Ohio St. 664; *Stacey v. Insurance Co.*, 2 Watts & S. (Pa.) 506; *Jackson v. Insurance Co.*, 23 Pick. (Mass.) 418; *Clark v. Insurance Co.*, 6 Cush. (Mass.) 342; *Hardy v. Insurance Co.*, 4 Allen (Mass.) 217; *Philbrook v. Insurance Co.*, 37 Me. 137; *Lindley v. Insurance Co.*, 65 Me. 368; *Gale v. Insurance Co.*, 41 N. H. 170; *Gee v. Insurance Co.*, 55 N. H. 65; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291; *Schenck v. Insurance Co.*, 24 N. J. Law, 447; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *May, Ins.* § 364. On the other hand, it has been held elsewhere that a subsequent policy, whether legally enforceable or not, or whether voidable on its face, or voidable for extrinsic matter, works a forfeiture of the prior policy. *Carpenter v. Insurance Co.*, 16 Pet. 495; *Allen v. Insurance Co.*, 30 La. Ann. 1386; *Somerfield v. Insurance Co.*, 8 Lea (Tenn.) 547; *Funke v. Association*, 29 Minn. 347, 13 N. W. 164; *Lackey v. Insurance Co.*, 42 Ga. 456; *Bigler v. Insurance Co.*, 22 N. Y. 402; *May, Ins.* § 364. There is still an intermediate view, taken by the supreme court of Iowa in the case of *Hubbard v. Insurance Co.*, 33 Iowa, 325, to the effect that the question of the validity of the prior policy turns upon whether the subsequent policy has in fact been avoided. If the second policy is recognized by the insurer issuing it to be a valid policy, any breach of condition being waived, this makes it a valid insurance, and avoids the first policy; but, if the subsequent policy has been rescinded for condition broken, there is no other insurance, so as to invalidate the prior policy. The obvious and insuperable objection to this latter view lies in the fact that it makes the validity of the contract between the parties under the first policy depend, not upon their own agreement, nor the effect of that agreement, nor upon their own acts, nor the acts of either of

void. This would, of course, be the proper rule if each of the policies provided, as is often the case, that if there be other insurance, "whether valid or not," notice must be given, and the consent of the company obtained. It may sometimes operate as a hardship to the insured for the courts to declare a policy void in an instance of this kind, where, perhaps, the additional insurance was procured with no fraudulent intent; but it is the duty of the courts to construe and enforce contracts, not to make or modify them. They must ascertain the intention of the parties from the written instrument, under the ordinary rules of interpretation, and these

them, but upon what another person (the second underwriter), a stranger to the first contract, may voluntarily do with respect to affirming or repudiating a totally different and distinct contract of insurance, without the slightest reference to any judicial inquiry as to the validity or invalidity of the second policy, or its resultant legal effect upon the first. Now, as the parties to the first policy of insurance have, by the unequivocal terms employed in their contract, declared that, if the property insured should be thereafter insured by any other company, the first policy should be void, unless the second insurance were made known to the first insurer, and were indorsed on the policy written by it, or were otherwise acknowledged and assented to by it in writing, and as the manifest object and design of such a provision were to guard against the dangers supposed to be incident to a double or an over insurance, the natural and reasonable interpretation of this forfeiting condition would, aside from adjudged cases, seem to prohibit a second valid insurance, and not a mere ineffectual attempt to procure additional insurance. The two things are not identical. 'Other insurance' does not mean a void policy, which obviously affords no insurance at all. Nor does it mean a policy which may, at the option of the underwriter, be canceled; for that is, at best, but conditional insurance. But it means a binding, available insurance,—one upon which the insured can rely for protection in case of loss, and which he can enforce by law, and which cannot be repudiated with impunity at the arbitrary election of the insurer. If the underwriter contemplated something else than a valid insurance under a second policy, it should have been expressed in plain and unambiguous language, as was done by the York Company. Upon the face of the latter's policy, it was expressly declared that the policy would be void if other insurance existed or were procured, even though the other insurance were itself invalid. And such a provision has been recognized as effectual. *Liverpool, London & Globe Ins. Co. v. Verdier*, 35 Mich. 395; *Bigler v. Insurance Co.*, 22 N. Y. 402. A second policy, which, by its own terms, is void for any cause, is not an insurance at all; and this is equally true whether the invalidity is apparent on the face of the policy itself, or is made to appear by evidence aliunde the policy."

intentions must be carried out by the judgment of the court, whether they are wisely calculated to protect the interests of the contracting parties or otherwise. When it does not appear that persons are incapacitated to contract for themselves, they will be bound by their agreements, when made within the limitations of the law; and the courts will not inquire whether the enforcement of these contracts, often, perhaps, foolishly entered into, will be to the advantage of one or both of the parties, or indeed of neither.

In *Suggs v. Hartford Ins. Co.*,⁵ the supreme court of North Carolina, in considering the gravity of a contract, and the liberty secured to every person of lawful age and sound mind to enter into agreements concerning all proper subjects, in his own manner and without restriction as to either matter or form, said: "It is not the province of the court to amend, modify, or make a contract for the parties, or to reform their contracts so as to render them reasonably expedient and just, or, in the absence of fraud, accident, or mutual mistake, to relieve them from misadventure, inadvertence, hard bargains, disadvantage, loss, and damage occasioned by lack of foresight, forgetfulness, misfortune, and negligence."

In the Hartford policy was expressed the following provision: "Or if there shall be any other insurance, whether valid or otherwise, on the property insured, or any part thereof, at the time this policy is issued, or at any time during its continuance, without the consent of the company written herein, * * * this policy shall be void." It was admitted that subsequent insurance was taken out, but it was claimed to have been done without a recollection of defendant's policy, and it was admitted that no notice had been given of such other insurance. The last-written policies both contained a provision in legal effect the same as that of the Hartford, and the plaintiff contended that, as his policies had never been operative, but were void from the beginning, because notice had not been given of the insurance in the Hartford Company, the policy of the latter was unaffected and continued valid. But the court said: "This argument is without substantial force. The clause of the policy sued upon, recited above, expressly embraced 'any other insurance, whether valid or otherwise,' and provided that the

⁵ 98 N. C. 143, 3 S. E. 732, and 17 Ins. Law J. 62.

same should render the policy void. The very purpose was to exclude and guard against, not only subsequent valid insurance, but all other, supposed or intended to be valid. * * * The terms employed are explicit, comprehensive, and exclusive, and they imply a distinct, obvious purpose. The manifest purpose of the provision in question was to prevent possible motive—the creation of it—of the assured to obtain larger insurance on the property, and then burn it, with a view to get the money agreed to be paid by each and all the insurers in case of loss. If the insured believed the subsequent insurance valid, as he might do, whether it was so or not, such belief would raise the motive intended to be guarded against as certainly as if it had been valid. To guard against such possibilities is not unlawful nor unreasonable; and, when parties choose to incorporate into their contracts provisions against them, it is the plain duty of the court to give them effect.”

The conclusion of the court cannot be well questioned that it was their duty to enforce the clear and distinct provisions of the policy. The reason given in support of the propriety of a stipulation such as that incorporated into the Hartford policy is forcible and just. The logic of this decision is that it is not the amount of insurance which a person may actually have, but the amount which he supposes he has, that creates a motive either to protect or destroy the property covered. Persons act from what they believe, and their conduct will be precisely the same whether they are mistaken in regard to the facts or not.

The supreme court of Indiana passed upon this question in *Phoenix Ins. Co. v. Lamar*.⁶ The policy in that suit provided, among other things: “If the assured shall have or shall hereafter make any other insurance (whether valid or not) on the property described, or any part thereof, without the consent of this company written hereon, then this policy shall be void.” The plaintiff averred and offered to prove that the insurance policy last written, in another company, was invalid, and could not be collected; that it did not, therefore, constitute additional insurance. The court held that this was immaterial; that the parties were bound by the con-

tracts they had made, under the terms of which the fact of whether the other policy was void or not had no important significance.⁷

§ 245. When, in Case of Double Insurance, the Last Insurer is Discharged.

It has been held that where two policies are issued at different times, each without notice of the other, insuring the same property, and both providing that the policy shall be void if there be other insurance without notice and consent, the last insurance, being voidable at the option of the company issuing it, is not in violation of the terms of the first policy, and will not excuse the first insurer from paying the loss. While we are wanting in no proper respect for the courts which have adopted this rule of construction, we must decline to accept a conclusion that involves so much of assumption, and is apparently so repugnant to the purposes of the usual provisions of an insurance policy in regard to other insurance. The same reasoning that will hold that the policy first written is valid will hold also the one last written enforceable, for, the provisions in each concerning other insurance being identical, they must stand on the same plane of advantage. Thus, the wise and conservative condition of the contract may be rendered nugatory by this species of legal casuistry. By deception, concealment, and fraud, a person may obtain in different companies and at different times insurance on his property largely in excess of its real value, and yet recover on all the policies, under the specious plea that none of them are actually void, because all are voidable.⁸

⁷ *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Liverpool, London & Globe Ins. Co. v. Verdier*, 35 Mich. 395.

⁸ The following cases are referred to as supporting the doctrine mentioned: *Gee v. Insurance Co.*, 55 N. H. 65; *Allison v. Insurance Co.*, 3 Dill. 480, Fed. Cas. No. 252; *Sutherland v. Insurance Co.*, 31 Grat. (Va.) 176; *Knight v. Insurance Co.*, 26 Ohio St. 664; also, *Fireman's Ins. Co. of Dayton v. Holt*, 35 Ohio St. 189; *Jackson v. Insurance Co.*, 23 Pick. (Mass.) 418; *Thomas v. Insurance Co.*, 119 Mass. 121; *Wilson v. Insurance Co. (Tex. Civ. App.)* 33 S. W. 1085.

In *American Ins. Co. v. Replogle* ⁹ the policy contained a stipulation, in substance, that if the insured should thereafter obtain any other insurance on the property insured, without the consent of the secretary indorsed thereon, the policy should be void. Subsequently, additional insurance was procured without the consent of the secretary of the American Company; but the defendant in error urged that the subsequent policy also contained a stipulation that the insurance should be invalid if there were other policies covering on the property, unless notice of such insurance was given, and the consent of the company obtained; and the defendant in error averred that he did procure the Ohio Farmers' Insurance Company to issue its policy to him without in any manner notifying it of the policy previously issued by the American Company, and for that reason claimed the last policy in the Ohio Farmers' never attached nor became a binding contract, and that logically, and as a matter of law, the American Company had not been relieved from payment of the loss. Mitchell, C. J., in discussing this case, said: "The primary purpose of inserting conditions against other insurance is to protect the company from the hazard of overinsurance. The condition implies that the insurance company will decline the obligation of insurer whenever the relations of the owner to the property are such that he would be benefited by, and might, therefore, have a motive for, its destruction. Consequently, it aims to secure the continual vigilance and co-operation of the owner in preserving the property, and compel him to maintain such an interest in and relation to the property as to have no motive for the relaxation of his care over it. The public, as well as the insurance company, has an interest in securing this end. Whenever, therefore, the property owner, in violation of a condition such as that in question, applies for and obtains a second policy, valid upon its face, with the intent and purpose to carry the second policy as valid insurance without giving notice thereof, he has thereby defeated the whole policy and purpose of the condition, and has done that which constitutes a complete defense to an action on the first policy. As was in effect said in *Lackey v. Georgia Home Ins. Co.*,¹⁰ if the property owner thinks the second policy is good, and intends it to

⁹ 114 Ind. 1, 15 N. E. 810, and 17 Ins. Law J. 456.

¹⁰ 42 Ga. 456.

be good, the danger of burning is the same as if it really were good. Purposely entering into a second contract of insurance was a violation of the condition in the first policy, and whether the second contract may or may not be voided for extrinsic matter cannot be considered in determining the validity of the policy first issued. Besides, to assume that the assured may maintain the validity of the first policy by setting up extrinsic facts tending to show that the second might be voided is practically to shift the real controversy, and compel the first insurer to go outside and maintain the validity of the second policy, although the validity of that policy may never be questioned by the company which issued it. The stipulation against other insurance may have been waived by the company issuing the second policy. *Havens v. Home Ins. Co.*¹¹ We have been unable to discover any satisfactory reason for the support of a proceeding so anomalous as that proposed. Moreover, the same reasoning which would uphold the right of the assured to avoid the defense in the present case would enable him to avoid a like defense to a second policy, and thus establish his right to recover on both. As applicable to the present case, we adhere confidently to the general conclusions stated in *Phenix Ins. Co. v. Lamar*, *supra*. If the prohibited policy, held or received by the insured, is in and of itself invalid or void, so that it in fact constitutes no contract of insurance, it will not affect the validity of that under which the claim for indemnity is made; but, if to avoid it requires the production of facts extraneous to the policy, it will be within the condition against other insurance, and, unless consented to, will render the other voidable.”¹²

¹¹ 111 Ind. 90, 12 N. E. 137.

¹² *Turner v. Insurance Co.*, *supra*; *Funke v. Insurance Ass'n*, 29 Minn. 347, 13 N. W. 164; *Baer v. Insurance Co.*, 4 Bush (Ky.) 242; *Carpenter v. Insurance Co.*, 16 Pet. 495; *Landers v. Insurance Co.*, 86 N. Y. 414; *Allen v. Insurance Co.*, 30 La. Ann. 1386; *Behrens v. Insurance Co.*, 58 Iowa, 26, 11 N. W. 719; *Lackey v. Insurance Co.*, *supra*; *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 513; *Equitable Ins. Co. v. McCrea*, Id. 541; *Suggs v. Insurance Co.*, 9 Ins. Law J. 657; *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486; *Mitchell v. Insurance Co.*, 51 Pa. St. 402.

§ 246. Insurance not Consented to will Cause a Forfeiture.

When permission is indorsed on the policy for additional insurance for a stated amount, and other insurance is obtained in a larger amount, it will be fatal to recovery.

In *Allen v. German-American Ins. Co.*,¹³ the policy permitted, by proper indorsement, a total insurance of \$15,320; but, on the occurrence of a loss, it was ascertained that this amount had been exceeded, and plaintiff contended that other insurance being permitted for a sum mentioned, in conformity with the terms of the policy, there could be no breach of the insured's agreement not to obtain additional insurance, and that the only question for the court was whether the excess procured beyond the sum specified in the consent written on the face of the policy was to the prejudice of the insurer's interests. Justice Gray, of the New York court of appeals, answered this contention by saying: "It was the same thing as though the warranty had read that the policy would become void if the assured should obtain agreements for insurance upon his property for an amount exceeding \$15,320."¹⁴

§ 247. Insurance on Separate Interests in the Property Covered will not be Other Insurance, within the Meaning of the Policy.

If it happens that different persons have separate interests in the same property, and each procures insurance for his own protection, without notice to and consent of the companies insuring the other interests, it will not be double insurance, and neither policy will be avoided. Thus, a mortgagor may insure his interests in the property as owner, and the mortgagee may insure his interests in the same property as security for the mortgage debt.¹⁵ So, too,

¹³ 123 N. Y. 6, 25 N. E. 309.

¹⁴ *East Texas Fire Ins. Co. v. Flippen*, 4 Tex. Civ. App. 576, 23 S. W. 550.

¹⁵ *Jackson v. Insurance Co.*, 23 Pick. (Mass.) 418; *Holbrook v. Insurance Co.*, 1 Curt. 193, Fed. Cas. No. 6,589; *Rowley v. Insurance Co.*, 36 N. Y. 550; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Sauvey v. Insurance Co.*, 44 U. C. Q. B. 523; *Carpenter v. Insurance Co.*, 61 Mich. 635, 28 N. W. 749.

when one person holds the legal title, and another a contract for a deed, both have independent, insurable interests; and, if both obtain policies, no obligation will exist on the part of either to procure the assent of the company which has issued a policy to indemnify the other.¹⁶

§ 248. Other Concurrent Insurance.

It is a common practice to indorse policies, "Other concurrent insurance permitted." With such qualified permission, whether the procuring of additional insurance that was not concurrent would cause an avoidance is a question which the courts have seldom passed upon. While the conditions of the contract restraining the insured from obtaining other insurance without the consent of the insurer were, perhaps, chiefly intended to prevent moral hazards, and to secure the largest degree of care in protecting the property covered, and while nonconcurrent insurance would not have the effect to defeat this purpose in any different manner or to any greater extent than would an insurance written to apply concurrently, there is undeniably a material difference in an important respect, as affecting the interests of the insurer, between these two classes of policies; and as the company accepting the risk may limit the amount of additional insurance, or prohibit al-

¹⁶ *Lowell Manuf'g Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591; *Nichols v. Insurance Co.*, 1 Allen (Mass.) 63; *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Acer v. Insurance Co.*, 57 Barb. 68.

A policy issued to the "heirs," and another to the "widow," protecting their separate interests, is not "other insurance," within the meaning of the policy. *Haire v. Insurance Co.*, 93 Mich. 481, 53 N. W. 623; *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490, 32 N. E. 914; *Mussey v. Insurance Co.*, 14 N. Y. 79; *Pitney v. Insurance Co.*, 65 N. Y. 6.

In the above case the property was owned in common by several persons. There was a joint policy, and one covering the interest of a single tenant. Held to be double insurance. *Billington v. Insurance Co.*, 39 U. C. Q. B. 433; *Horridge v. Insurance Co.*, 75 Iowa, 374, 39 N. W. 648; *Gillett v. Insurance Co.*, 73 Wis. 203, 41 N. W. 78.

Where two partners obtained policies, each on his undivided interest, it was held not double insurance. *Hall v. Insurance Co.*, 90 Mich. 403, 51 N. W. 524.

together any further sum being written, why may it not also, in consenting to other insurance, prescribe even arbitrarily the form in which it shall be made to apply? The contract, before any privileges are added, imports an absolute prohibition of other insurance. By the indorsement referred to, the rigor of the prohibitory clause is softened and modified, but not to the extent of permitting "other insurance" without qualification. It is something less than is granted, something of equal value to the insured, and at the same time something that the insurer nominates and insists upon as a condition on which it consents to become a co-insurer with other companies. This it may do as a right, and, when done, it becomes a part of the contract. It is substituted for the original provision, by which all other insurance was interdicted. It is in violation of no principle of law or morality; and as the words used are free from ambiguity, and clearly express the intention of the parties, there is nothing for the courts to construe, nor will they be justified in extending the privilege, plainly defined and limited, to include something other and materially different from what the parties themselves contemplated. The settlement of claims for loss, where the policies involved are nonconcurrent, so frequently results in difficult complications, bad feeling, and contention, that the insurer may with excellent reason object to continuing the risk unless the other insurance is made to cover in such a manner that the apportionment of the loss, when computed, will be a simple matter of mathematics.

In deciding the case of *East Texas Fire Ins. Co. v. Blum*,¹⁷ the court has construed the meaning of the word "concurrent" when used in a policy of insurance. It says: "If the words evidence any agreement at all, or are to be given any effect, then it becomes necessary to construe them. If they are used for the purpose of limiting the assured, with or without consent, to procure other insurance, what do they mean? The word 'total' means 'all,' 'the whole,' which sum is \$4,000. This sum, however, must be made up of insurance concurrent. The word 'concurrent' means literally 'running together,' and, in the connection here used, has the sense of 'co-operating,' 'contributing to the same event.' Worcester.

'Acting in conjunction; agreeing in the same act; contributing to the same event or effect; co-operating; accompanying.' Webster. In the absence of something in the contract showing that the word was not used in its ordinary sense, it must be understood so to have been used, and nothing of that kind is found. To be concurrent, the insurance must operate at the same time, upon the same property, and look to the indemnity of the insured in case of its loss or destruction from casualty insured against."

We may add that the word "concurrent," when used in an insurance policy, has come to have a somewhat technical meaning, which, while in no sense inconsistent with the definitions given by the court and the lexicographers referred to, does in a measure enlarge its significance, and adapt it to the business uses for which it is applied. Concurrent policies are such as conform to each other in respect to such subjects as are matters of mutual interests, and common concern. These will generally be limited to the written portion of the policy, and to the manner in which the sums written are made to apply in reference to the several subjects of insurance. The object to be secured is to prevent obscurity and contention in the apportionment of an ascertained loss, to fix definitely the proportion for which each company interested in the misfortune is liable.

When a policy is issued and delivered to the insured, and he then procures additional insurance to be written on the same property in another company, and the agent of the company who wrote the first policy is made acquainted with the fact of the subsequent insurance, it is not incumbent upon him to take any action in the matter. If the company which issued the subsequent policy had knowledge of the first insurance at the time, or afterwards consented to it, the first policy was voided when the second was written, and no duty rested upon the first insurer to offer cancellation, and return the unearned premium.¹⁸

¹⁸ Bennett v. Insurance Co., 55 N. J. Law, 377, 27 Atl. 641; Hughes v. Insurance Co. (Neb.) 59 N. W. 112; Johnson v. Insurance Co., 41 Minn. 396, 43 N. W. 50.

In last case cited, it was held that the failure to cancel policy, on receiving notice of other insurance, did not justify the conclusion that the insurer elected to continue the risk. Barnard v. Insurance Co., 27 Mo. App. 26;

§ 249. When the Policy is Voided by Reason of Other Insurance, There can be No Rescission.

This was held by the supreme court of Minnesota in the case of *Johnson v. American Ins. Co.*¹⁹ The court said: "By the plain terms of the policy, other insurance without the consent of this company would ipso facto avoid the contract; and, in the case of a contract thus avoided, it would not be obligatory upon the insurer to repay any of the unearned premium, nor would he be required to give notice that he should insist upon and avail himself of the proper legal effect of the agreement. It required no affirmative act of election on the part of the company to make operative the clause avoiding the contract whenever the specified conditions should occur. Its obligation ceased, unless, being informed of the fact, it consented to the additional insurance, or in some manner waived the forfeiture."²⁰

§ 250. Not Double Insurance unless Both Policies Protect the Same Interests.

It will not be double insurance unless the policies are written to protect the same interests. When the property is insured by the owner, and afterwards the policy is assigned to a mortgagee,

Queen Ins. Co. v. Young, 86 Ala. 424, 5 South. 116; *German Ins. Co. v. Heiduk*, 46 N. W. 481, 30 Neb. 288, and 20 Ins. Law J. 206; *Carpenter v. Insurance Co.*, 16 Pet. 495; *Forbes v. Insurance Co.*, 9 Cush. (Mass.) 470; *Hutchinson v. Insurance Co.*, 21 Mo. 97; *Allemania Fire Ins. Co. v. Hurd*, 37 Mich. 11; *Hower v. Insurance Co.*, 58 Iowa, 51, 12 N. W. 79, and 11 Ins. Law J. 358.

The policy provided that only written consent would be binding. Held, that oral consent could not be shown. *Day v. Insurance Co.*, 88 Mo. 325.

It will be substantial compliance if consent be in writing, although not written on policy. *Mattocks v. Insurance Co.*, 74 Iowa, 233, 37 N. W. 174.

¹⁹ 41 Minn. 396, 43 N. W. 59.

²⁰ It was held in case of *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486, that, where the policy provided that there should be a forfeiture if other insurance was obtained without consent of the company indorsed on the policy, on a breach of the condition the policy became void at once, and that nothing could revive it short of a new contract, supported by a valid consideration.

the owner may then procure another policy without notice to or consent of either the first or last insurer, and both policies will be enforceable in the event of a loss; this, because the owner has parted with his interest in the policy first written, and will be entitled to receive no benefit from it in the settlement of a loss claimed. After the assignment of the policy with the consent of the company, the mortgagee becomes absolutely the party insured; and the owner of the estate is as much a stranger to the contract as he would be if it related to property in which he was in no wise concerned, and, should the insurer pay a loss under such policy, the latter would be entitled to subrogation, and the sum paid could not be applied to cancel the mortgage debt. The case is otherwise where the policy is written in the name of the owner of the property covered, and indorsed, "Loss payable to the mortgagee." It is the owner, and not the mortgagee, who is insured. The latter is only the payee of the policy. By agreement of the parties, he has been appointed to receive, in settlement of any loss which the property has sustained, such sum as may be due to the owner. The mortgagee in this case has no duties to perform as to the insurer, and can do nothing in avoidance of the policy. While he obtains an incidental advantage in the better preservation of his security, the owner and mortgagor is the benefited party, and the money paid to the mortgagee on the adjustment of a loss will be applied in the reduction or extinguishment of the mortgage debt.

In *Woodbury Sav. Bank v. Charter Oak Ins. Co.*,²¹ the policy contained a condition that it should become void if other insurance were obtained without the consent of the company indorsed thereon. There was an equity of redemption, and the owner thereof procured a later insurance unknown to the party first insured. The court held that the insurances were on distinct and separate interests, and that the first insurer was not discharged. See, also, in support of the general principle of construction here declared, *Nichols v. Fayette Ins. Co.*, *supra*.

The case of *Home Ins. Co. v. Baltimore Warehouse Co.*²² is often referred to, both on account of its high authority and the frequent recurrence in litigation of some of the important ques-

²¹ 31 Conn. 517.

²² 93 U. S. 527.

tions there decided. The warehouse company took out insurance to protect themselves on account of charges and advances, and also to protect the interests of the owner and consignors. The latter had also procured policies to protect their own interests. The court held that the policies procured by the warehouse company, so far as they would apply to protect the interests of the consignors, were other insurance without notice and consent, and, of course, void.

§ 251. When Consent in Writing must be Had.

When the policy provides, as is generally the case, that consent for other insurance must be in writing, the verbal assent of the agent will not be sufficient. This general statement of the law must be qualified to the extent that, if there be prior insurance which was known to the company when issuing its policy, the principle of equitable estoppel will apply to defeat a forfeiture. The courts will not permit the insurer to receive a premium with full knowledge of facts that, under the terms of the policy which it issues and delivers, render it void from the beginning. To do so would be to sanction a species of injustice and robbery that courts are organized to punish and suppress.

§ 252. Who may Consent to Additional Insurance.

If the policy provides what officer or agent has authority to receive notice and consent to subsequent insurance, the consent of some other officer or agent will not bind the company. When the policy, however, is silent in this regard, the agent who issued the policy, or who has general powers in respect to making contracts of insurance, can receive notice and bind the company by his consent, if given in the form provided; but an agent living in another town, who has never been called to perform any duties in relation to that particular business, will be *prima facie* without authority to act in such a manner as to bind the insurer.²³

Notice to a former agent, whose authority has been revoked, al-

²³ Security Ins. Co. v. Fay, 22 Mich. 467.

though he may have been the person who issued the policy, will not be sufficient. The insured cannot be protected in his neglect to inquire as to what person has authority in the matter. "He is bound at his peril to give notice to one authorized to receive it." ²⁴

The burden of proof is on the insured that notice was given to a person having authority to receive and act upon it, but the bare revocation of an agent's authority will not always relieve the company from the responsibility of his subsequent acts. A certain degree of publicity should be given to the withdrawal of an agency. When a person has been recognized by a company as having authority, and continues to hold its books and the agency supplies in his possession, although his authority may have been privately withdrawn, but nothing has been done to apprise the public of the fact, or to put persons dealing with him on inquiry, notice to such person of other insurance, when only notice is required, and received in silence, will bind the insurer. In a case of this kind the question presented will be, did the insured know of the termination of the agency, or could he have known it with due care and on reasonable inquiry? ²⁵

§ 253. Conclusions.

The prohibitory conditions of the policy concerning additional insurance are conservative in their purpose, and refer directly to diminishing the risk assumed, by guarantying a watchful interest

²⁴ Illinois Mut. Fire Ins. Co. v. Malloy, 50 Ill. 419; Gilbert v. Insurance Co., 36 Barb. (N. Y.) 372.

²⁵ Ganser v. Insurance Co., 38 Minn. 74, 35 N. W. 584, and 17 Ins. Law J. 105.

The company was insolvent, but the agent had not been informed of the fact, and continued to transact business in the usual way. Held, that policies issued under these circumstances can be enforced. In re Pelican Ins. Co. of New Orleans, 47 La. Ann. 935, 17 South. 427.

Sumpter & Son were authorized agents of the Burlington Insurance Company, had general powers to effect insurance, write policies, make indorsements, etc. Their agency was subsequently withdrawn, without notice to plaintiff. After revocation of authority, they consented by written agreement to the changed location of the insured property. The company was held to be charged with the loss. Burlington Ins. Co. v. Threlkeld, 60 Ark. 539, 31 S. W. 265.

on the part of the insured. The intent of the company is based upon that inborn principle of human selfishness which causes thrift and prosperity, by stimulating each individual person to look carefully after that which is his own.

When the agent who negotiates the insurance has knowledge of other policies on the risk, the insurer will be forbidden to invoke a forfeiture on account of such prior insurance, although, in contravention of the terms of the policy, there has been a failure to indorse thereon his consent.

While the insurer will generally be bound by his knowledge of facts existing when the policy issues, it is not his duty to take notice of subsequent changes, unless brought to his attention in the manner prescribed in the policy. It is competent for parties to stipulate as to the character of evidence that shall be conclusive as to subsequent modifications of their contract, and thereby prevent the mistakes and fraud which frequently occur when important matters are determined by the vague recollections of persons whose interests are antagonistic, and who will testify under a strong temptation to have "the wrong appear the better side."

Policies covering on separate interests will not be double insurance. Partners may each insure their individual interests in property owned jointly. The mortgagor and mortgagee may insure their separate interests, and neither will be required to give notice to the insurer of the policies held by the other.

Permission for other "concurrent" insurance does not remove nor lessen the rigor of the restrictions in regard to policies that are not concurrent. As there is no law or custom of business that can reconcile or bring into relations of harmony that which is antagonistic on grounds of interest, as the incomprehensible defies comprehension, as no wisdom of the courts is equal to apportioning a loss under nonconcurrent policies except by the exercise of a judicial fiat, the prudent and conservative underwriter may stipulate against becoming a coinsurer under policies so dissimilar and refractory in their terms that they cannot, under the rules of business and the mathematics of the counting room, be brought into intelligible conformity.

CHAPTER XIII.

LOCATION OF RISK.

§ 254. Location and Circumstances of the Risk must not be Changed.

255. The Conditions of the Policy in Respect to Changes must be Strictly Construed.

256. It is Judicial Tyranny for the Courts to Substitute Their Own Ideas as to What the Contract should be, for the Carefully Formulated and Clearly Expressed Agreement of the Parties.

§ 254. Location and Circumstances of the Risk must not be Changed.

The insurer will not generally be liable if the situation of the insured property has been changed during the term of the policy. The character and value of the risk are largely dependent on the circumstances of its location. In the classification of risks, consideration is always had to the particular dangers incident to location. Thus, "household goods" contained in an unexposed dwelling would be less liable to suffer loss from fire than would be the case if contained in a furniture manufactory, where wood shavings were made and steam power was employed. The rate of premium at the former location would be ordinarily about one-tenth the rate paid at the latter. The consideration upon which the promise to insure rests, therefore, being fixed largely in reference to the location and surroundings of the property, any change increasing the value of the hazard on account of its environments, without the consent of the insurer and the payment of an additional premium, would be in violation of the terms of the engagement between the parties, for the very substantial reason that the burden imposed upon the insurer would be increased without any compensating benefit. Thus, it will be seen that, when any change occurs whereby there comes to exist a greater probability that the subject of insurance will sustain loss or damage, there will, at the same time, and for the same reason, come to exist a partial failure of the consideration. But there are other reasons equally cogent why the location of the property described in the policy should not be

changed without the express consent of the insurer. It is stipulated in nearly all insurance policies, in some form of words, that "if the hazard be changed by any means within the control of the insured, without the consent of the insurer, there shall be no liability." It will be admitted that a stipulation of this kind must be reasonably construed, and not with such arbitrary insistence upon the literal definition of words as will defeat the principal obligation into which the insurer has entered. It should, however, be kept in mind that the relations existing between the parties are all created by the terms of the contract; that outside of it there are no duties, either legal or moral, which one owes to the other. What ulterior reasons the insurer may have for the stipulation above referred to it is unnecessary to inquire. The stipulation is a part of the contract, valid, and should be enforced by the courts, with the same regard to protecting the rights and maintaining the good faith of parties as would be observed concerning the enforcement of other provisions.

In *McCluer v. Girard Fire & Marine Ins. Co.*¹ the policy covered, among other things, a phaeton contained in a frame barn. This had been removed to a carriage shop for repairs, and, while there, was destroyed by fire. The court said: "It is true that any statement or description on the face of the policy which relates to the risk is a warranty;² and where goods are described as being in a building occupied in a certain way, the words describing the occupancy must be regarded as employed to express a fact relating to the risk.³ Representations in regard to circumstances affecting the risk amount to a stipulation that no change will take place whereby the risk will be increased.⁴ Where, therefore, an applicant claims that the place in which the insured property is selected is made a part of the description for the purpose of defining the risk, and a removal takes place not contemplated by the policy, the property is no longer covered. This doctrine is distinctly held in *Boynton v. Clinton & Essex Mut. Ins. Co.*⁵ and *Annapolis & E. R. Co. v. President, etc., of Baltimore Fire Ins. Co.*"⁶

¹ 43 Iowa, 349.

² *Wood v. Insurance Co.*, 13 Conn. 544.

³ *Wall v. Insurance Co.*, 7 N. Y. 370.

⁴ *Houghton v. Insurance Co.*, 8 Metc. (Mass.) 114.

⁵ 16 Barb. 254.

⁶ 32 Md. 37.

The court applies this principle of construction only to such chattels as stocks of merchandise, and to such other things as in their ordinary use may remain in one particular designated place; noting the important but doubtful distinction between such articles and another class of property, such as horses, carriages, wearing apparel, etc., that in their ordinary uses will temporarily be moved from the place of usual deposit. It says: "We are of the opinion, therefore, that while the words 'contained in a barn,' describing it, are words relating to the risk, and constitute a warranty that the carriage would continue to be contained in the barn, they mean only that the barn described was their place of deposit when not absent therefrom for temporary purposes incident to the ordinary uses and enjoyment of the property. * * * We might, indeed, concede that the carriage shop was not as safe a place as the barn, although the evidence upon this point does not clearly show whether it was or not."

§ 255. The Conditions of the Policy in Respect to Changes must be Strictly Construed.

This case has been selected for criticism because it distinctly raises the principal points involved in the discussion upon which we have entered. It is, too, one of a class where the decision has gone upon the theory that it was in the contemplation of the parties, when the insurance was effected, that the indemnity should continue on the property mentioned, although removed from the place named in the policy, if such removal was in the ordinary enjoyment of the property, through the uses for which it was particularly designed. This conclusion is specious and sophistical, resting entirely on a presumption that is raised in most instances at the expense of setting aside an express provision of the contract. Reference is here made to the common stipulation that "if the hazard be increased by any means within the control of the assured, without the consent of the company, the policy shall be void." But the Iowa court says that it is immaterial whether or not the carriage was less secure at the shop than at the barn. This ruling abrogates a distinct provision of the contract, and the justification offered is the presumed intention of the parties that the car-

riage should be covered when away from the barn in the ordinary use. It is a rule of law that presumptions will not be permitted to rebut positive testimony or to change the unambiguous provision of an express contract. To invoke this rule here would dispose of the presumptions upon which is based the reasoning of this often-cited authority. Let us now briefly inquire what reasonable presumptions would exist in a similar case to that which we are here considering. Suppose the carriage insured was contained in a farm barn where the premium paid was at the annual rate of one-half of 1 per cent., and the shop to which it was removed for repairs was rated for the same term at 4 per cent. The rates here named are not unusual for these two classes of hazards. Can it be fairly presumed that the insurer, when accepting the risk on a carriage contained in a farm barn, at the low rate of 50 cents per annum, contemplated that it would be charged with the liability of a manufacturing establishment, where the hazard was computed to be eight times greater? Such a presumption violates every principle of business sense. Nowhere in the policy is exactness more important, more carefully studied or expressed, than in reference to the location of the property insured. The term of insurance in most instances is for one year, and the company realizes that before the expiration of that period it may be subjected to such vicissitudes as to change the character of the venture, so that it will be necessary to direct cancellation. To enjoy this privilege, and exercise it intelligently, the insurer must be permitted to make occasional inspections; and this would not be possible unless the location of the risk was definitely known. The prudent underwriter is cautious about accepting lines on the class of special hazards to which carriage factories belong. They may be prohibited altogether, as is the case with "farm companies," or, if consenting to write at all, only for a small amount.

The presumptions on which the Iowa court bases its decision wholly ignore these rights and practices, contemplate a substantial abandonment of the privilege of inspection, and change a risk, without the insurer's knowledge and consent, from a desirable location to one that is especially hazardous, without any increase of premium.

Another difficulty is presented in accepting the interpretation of the contract offered by the Iowa court, growing out of the uncertainties that will frequently exist as to what may be considered "ordinary use." The mystic line which the colt passes in becoming a horse is no more obscure than the line separating the "ordinary" from the "extraordinary" use of this class of property. Would it be permitted for the carriage mentioned to remain at the repair shop, without prejudice, one month or six months? Who shall decide, and, in doing so, within what limitations shall circumstances be considered, such as labor strikes, unfavorable weather, sickness, etc.? When, in a matter of this kind, the court departs from the safe anchorage of the written stipulation, it enters upon a boundless sea of speculation. Locke, in his work on the "Human Understanding," says: "The greater part of the questions and controversies that perplex mankind arise from the doubtful and uncertain use of words, or the indeterminate ideas which these words are made to stand for."

Attention is called to these facts, which the writer believes will dispose of the presumptions on which alone rests the reasoning of the court in the case of *McCluer v. Girard Fire & Marine Ins. Co.* Had the record on which the court was there called to pass judgment shown the necessary facts for an intelligent understanding of the matter, we may fairly infer that a conclusion substantially different would have been reached.⁷

But a different, and I think a wiser, rule of construction, has been laid down by other courts; and the words "contained in" have been held to be warranties as to location.⁸

⁷ The principal cases referred to as sustaining the doctrine of the Iowa court are *Everett v. Insurance Co.*, 21 Minn. 76; *Holbrook v. Insurance Co.*, 25 Minn. 229; *Longueville v. Assurance Co.*, 51 Iowa, 553, 2 N. W. 394; *Lyons v. Insurance Co.*, 13 R. I. 347; *Noyes v. Insurance Co.*, 64 Wis. 415, 25 N. W. 419.

⁸ The leading cases so holding are *Bradbury v. Association*, 80 Me. 396, 15 Atl. 34; *1 Wood, Ins.* 110; *Blodgett*, 22; *Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.*, 1 Cliff. 300, Fed. Cas. No. 4,277; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *Fitchburg R. Co. v. Charlestown Mut. Fire Ins. Co.*, 7 Gray (Mass.) 66.

In *Bradbury v. Fire Ins. Ass'n* the policy covered \$500 on carriages mentioned as "contained in" a livery and boarding stable. The hack for which damages was claimed had before the fire been removed to the repair shop of one Litchfield, situated on another street, several blocks away. The rate of insurance at the repair shop, it was admitted, was greater than at the stable where the hack was when the computation of premium was made, and the insurance effected. The court said: "The policies insure such of the plaintiff's carriages, hacks, etc., as are contained in his stable at the time of the loss. We can see no other way of identifying the property covered by the policies. It cannot be that the policies should be so construed that they will cover a hack once put into the stable, and then taken out, wherever it may be. The language of the contract is not apt to embrace such a risk. The risk might thus be increased twofold or threefold, and still, if the contract must be construed as covering it, it is not a forfeiture of the policy for an increase of the risk. It is simply the risk contemplated by the parties."

The case of *English v. Franklin Fire Ins. Co.*,⁹ in its essential facts, is closely analogous to that of *Bradbury v. North British & M. Ins. Co.*;¹⁰ and the opinion, it will be observed, was written by Cooley, C. J. The policy insured household goods "all contained in his dwelling house." On November 13th a fire occurred, by which the dwelling was destroyed, and that portion of the contents saved was stored in a barn on the premises, which was also burned about four weeks afterwards, resulting in the entire destruction of what remained of the household goods after the fire of November 13th. Suit was brought to recover under the policy insuring on dwelling, for the goods contained in the barn. Judge Cooley said: "The class to which the goods in question belonged was insured as situated in a described building, which the policy designated as the 'dwelling house,' and the description makes it very clear that no other building was to be understood to be included."

It may be claimed that the distinction should be made between "ordinary use" and an extraordinary exigency, such as the occur-

⁹ 55 Mich. 273, 21 N. W. 340.

¹⁰ 80 Me. 396, 15 Atl. 34.

rence of a fire; but I think that any presumptions that could be raised in favor of the first should exist also to impose a liability in case of the last. But the Michigan court, in holding that the defendant company was not liable for the household goods stored in the barn, does not intimate the existence of a presumption that the parties, in contracting, had in contemplation that, in the event of a partial loss by fire, the property saved would be protected under the policy, while stored in a contiguous building.

And so, too, in *Lyons v. Providence-Washington Ins. Co.*, *supra*. The policy there insured articles of household furniture "contained in" a designated dwelling. Before loss, and without the knowledge of the defendant company, the property was removed to another building. The court said: "There seems to be no doubt but that, if this question were to be decided on authority, it must be taken as the general rule that all material statements of the policy of insurance, including statements as to the place in which the insured property is situated, are warranties, and that such warranties must be true, and must continue to be true during the whole life of the policy, as a condition of any recovery thereunder.

* * * We think the interpretation of the words of this policy as a warranty is well drawn from the nature of the contract of insurance. It must be evident to any person who at all considers the nature of that contract that the amount to be charged for premium must vary on consideration of the location of the property to be insured; and but small reflection would be necessary to perceive that the removal of the property to another place might be greatly to the disadvantage of the insurer, although such new place of deposit might not be in itself more exposed to damage from fire, since the result of such removal, if permitted to a considerable extent, might be to expose an undue proportion of his capital to the risks of a single conflagration."¹¹

A harvesting machine was insured "while operating in the grain fields, and while in transit from place to place." It became necessary, in the ordinary uses of the machine, that it be taken to a blacksmith's shop for repair, and, while there, it was burned. The California court found no ground for construction. The language

¹¹ *Towne v. Association*, 27 Ill. App. 433; *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166.

of the policy was distinct, and sufficient to express that the liability of the insurer was limited to the times when the machine was being operated in the grain fields, and in transit from place to place, and it was so held.¹²

There was an insurance written to cover on grain in granary, tools and implements in toolhouse. Afterwards, and during the term of the policy, the insured built a new barn, and, when completed, removed the grain and tools, for his greater convenience or better protection, to that building, and the property was thus located when destroyed. It was the opinion of the court, after a careful examination of many authorities, that the situs of the risk had been changed, and that the insurer could not be charged with the payment of the loss.¹³

§ 256. It is Judicial Tyranny on the Part of the Courts to Substitute Their Own Ideas as to What the Contract should be, for the Carefully Formulated and Clearly Expressed Agreement of the Parties.

In this case, as in that of the harvesting machine above mentioned, if the policy was to be construed in reference to the ordinary uses of the property covered, the promised indemnity would have followed the harvester to the blacksmith shop, and the grain and tools to the new barn, where they may have been more safely and conveniently stored. But the courts have nothing to do with utilities in a matter of this kind, except as they create presumptions in regard to the intention of the parties. And, when the intention of the parties is clearly expressed, that is an end of it. There is no occasion to construe, and presumptions are irrelevant and immaterial.¹⁴

A recent case in Pennsylvania¹⁵ illustrates the too common

¹² *Mawhinney v. Insurance Co.*, 98 Cal. 184, 32 Pac. 945. Where property is insured "only while contained" in a place particularly designated, it will not be covered when located elsewhere. *Green v. Insurance Co.*, 91 Iowa, 615, 60 N. W. 189.

¹³ *Benton v. Insurance Co.*, 102 Mich. 281, 60 N. W. 691.

¹⁴ *Lakings v. Insurance Co. (Iowa)* 62 N. W. 783.

¹⁵ *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 173 Pa. St. 53, 34 Atl. 16.

tendency of many courts to assume a dangerous prerogative in putting aside contracts which the parties have made for themselves, and substitute others which they may suppose better suited to the circumstances which they find to exist. The contest referred to a loss on patterns, which at the time the insurance was negotiated were "contained in the pattern house," but at the time of the fire had been removed to the foundry, which alone was burned of the two buildings comprising the plant. The clause in the policy particularly locating and defining the risk read as follows: "While located and contained as described herein, and not elsewhere." The insured property was mentioned as being "in the pattern house." It was held that the insurer was charged with knowledge of the uses of the property covered by its policy, and that as, in the usual course of the business carried on by plaintiff, the patterns would frequently be in the foundry, it must be presumed to have been within the contemplation of the parties that they would be covered there as well as in the pattern house. The vice of this decision is that the court has attempted to construe a clause of the contract that could not be made more plain and definite by the use of the entire English vocabulary. The property in dispute was insured in the "pattern house," and "nowhere else." The construction of the court compels the defendants to pay under a contract which they never agreed to. If the policy had been obscure or ambiguous, then the court would have been called upon to construe, and, in doing so, it would have been proper to consider the ordinary uses of the property covered. The right to make our own contracts is one of the most valuable guaranteed to us by the federal constitution. In its full exercise we find our largest liberty, and are most successful in our "pursuit of happiness." It will be admitted that the contract, as written, in its literal application, plainly limited the liability of the insurer to the "pattern house"; but the court says that the company must be charged with knowledge of the use of the patterns at the foundry, and therefore extends the liability of the insurer to that building.

Suppose, for purpose of illustration, that Mr. Brown is engaged in banking at McKeesville, but resides on his farm in the country, driving into the city every morning, and placing his horse and carriage at a frame livery stable during the day. This horse and

carriage are insured with his farm property, and "while contained in" a specified farm barn, and "nowhere else," the rate for this insurance on the farm property is 1 per cent. for five years, and the rate at the livery stable 5 per cent. for one year. It will be understood that Mr. Brown's business is notorious, and that the agent who wrote the policy was familiar with the fact that the horse and carriage were in town at the livery barn during banking hours each day in the week. Can it be supposed that under these circumstances it was in the contemplation of the parties that the horse and carriage should be insured both at the farm and in town? Were not the parties competent to make exactly the contracts which the policies evidence? By what authority does the court say that Mr. Brown and his insurer intended something different from that which the contract clearly expresses?

Manufacturers frequently obtain a lower rate because their risks are made specific, as in this case, and distributed at different places. Could the court know in this instance that the defendant had not given the plaintiff a lower rate on account of the fact that its liability for loss on patterns was confined to a particular building?

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CHAPTER XIV.

ARBITRATION.

- § 257. Parties may Contract as to Manner of Settlement, Providing the Enforcement of Their Agreements does not Oust the Courts of Their Jurisdiction.
258. When Arbitration or Appraisement is a Condition Precedent.
259. Arbitration in Case of Total Loss.
260. General Considerations.
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262. When the Stipulation to Arbitrate or Appraise is not a Condition Precedent.
263. Neither of the Parties can Insist on Conditions, in the Submission, Different from Those Expressed in the Policy.
264. The Submission should Distinctly Express the Exact Duty which the Appraisers or Arbitrators are to Perform.
265. In the Submission There should be No Substantial Departure from the Agreement of the Parties as Expressed in the Policy.
266. Award is made a Condition Precedent Only When a Prescribed Line of Action is Consistently Followed.
267. When Award is Defeated by the Arbitrary Insistence of Either of the Appraisers on the Performance of Unreasonable Things, the Misconduct of Such Appraiser will be Chargeable to the Party by Whom He was Selected.
268. Submission may be by Parol unless the Policy Otherwise Provides.
269. Whatever the Appraisers do in Excess of Their Authority will be void.
270. Appraisers may Construe Contracts, and Pass upon Other Questions of Law, when Necessary to do So in the Performance of the Duties Submitted.
271. Good Faith is Required in All Things, from the Submission to the Award.
272. The Duties of the Appraisers are Judicial. Nothing can be More Improper in the Appraiser than the Character of Agent or Attorney.
273. General Considerations.
274. A Submission to Appraisers is not a Waiver of Other Defenses within the Terms of the Policy.
275. When the Insurer has Acted in Good Faith, a Failure to Obtain an Award will not Give the Insured a Right to Bring Suit on the Policy.

- § 276. When Arbitration and Award are Conditions Precedent, There will be No Right of Action without Performance, unless Performance is Excused through the Fault of Insurer.
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284. Who are Qualified as Arbitrators or Appraisers.
285. When a Stockholder may Act as an Appraiser or Arbitrator in a Matter in Which the Corporation is Interested.
286. A Person Who has Formed an Opinion is Disqualified to Serve as Arbitrator.
287. The Award will be Upheld if Arbitrators were Known to have Formed Opinions at Time of Their Appointment.
288. Arbitrators may Select Time and Place of Meeting.
289. Parties must have Notice of the Time and Place of Meeting of Arbitrators.
290. Arbitrators must Act Together.
291. When One of the Three Arbitrators Withdraws During the Inquiry, the Other Two may Proceed, and the Award will be Good.
292. When Arbitrators cannot Refuse to Hear Evidence.
293. When Arbitrators may Meet without Notifying the Parties.
294. Distinction between Appraisement and Arbitration.
295. When Notice of Meetings is Indispensable, and When It may be Omitted.
296. When the Award has been Signed and Delivered, it cannot be Recalled; the Appraisement has Terminated.
297. Submission Need not be in Writing.
298. Conclusions.

§ 257. Parties may Contract as to Manner of Settlement, Providing the Enforcement of Their Agreements does not Oust the Court of Its Jurisdiction.

It is now with much uniformity held by the courts that parties may contract in regard to the method of settling any particular

question that is likely to arise.¹ In building, it frequently happens that the contract is so framed between the owner and those who engage to furnish the material and labor that payment shall be made as the work of construction progresses, only on the certificate of an architect designated; and in such cases it has been held that the furnishing of such architect's certificate is a condition precedent. So, too, in regard to questions which are liable to arise in the performance of any contract, it is competent for parties to agree beforehand that, in the event of a disagreement, any particular matter in dispute shall be finally disposed of without resort to the courts; as by reference to some person named or to be afterwards appointed in the manner designated in the contract. There are many authorities in support of this proposition; and except in Nebraska I find no court in either England or the United States where the correctness of the doctrine is now questioned.

Under the insurance policy this same right has frequently been the subject of contention in one form and another; and, if there has been some diversity of opinion among jurists in regard to the enforcement of what is known as the "arbitration clause," it is because the policies on which the courts have been required to form a judgment have often been framed in such a manner as to make the enforcement of this provision repugnant to law, and a flagrant injustice to either one party or the other. In *Scott v. Avery*,² the lords entered upon a very exhaustive discussion of the legal principles involved in the contention that the settlement of a loss or damage under an insurance contract by arbitration and award should precede a right of action, when the policy, as in that case, by suitable words so provided. The lords reached the conclusion that while an agreement to submit all questions which might arise in the settlement of claims under a policy of insurance would not be enforceable, as it would oust the courts of

¹ *Carroll v. Insurance Co.*, 72 Cal. 297, 13 Pac. 863; *Adams v. Insurance Co.*, 70 Cal. 198, 11 Pac. 627; *Gauche v. Insurance Co.*, 10 Fed. 347; *Scott v. Avery*, 20 Eng. Law & Eq. 327.

When policy provides that no action shall be maintained except on an award, the condition must be complied with, unless excused. *Niagara Fire Ins Co. v. Bishop*, 154 Ill. 9, 39 N. E. 1102.

² 5 H. L. Cas. 811.

their jurisdiction, parties might agree that any particular question, such as the matter of "damage or loss," should be submitted to arbitrators, and that an agreement incorporated into the policy that such arbitration should be had and an award returned would be a condition precedent, and that an action to recover would not lie unless an award had first been made, or an offer to arbitrate shown by the party seeking an enforcement of the contract. This, it was held, did not go to the root of the matter, as only the single question of loss was involved, and therefore did not interfere with the jurisdiction of the courts.

§ 258. When Arbitration or Appraisement is a Condition Precedent.

American decisions have followed and approved the principles of law laid down in *Scott v. Avery* with a unanimity that proves their correctness, and, I might add, usefulness, when applied to the construction of an insurance contract. It is true that the provision in regard to arbitration or appraisement in the insurance policy, intended to facilitate the adjustment of claims, has been the cause of much contention; and there is perhaps no one question that we are called to consider that has about it so many elements of doubt and perplexity. But, when the stipulation to determine the amount of loss by such method has been properly and distinctly formulated, I do not recall any decision where the courts, except in Nebraska,* have refused to recognize its validity, unless in some manner there have come to exist complications on account of informality or because of subsequent waiver. Many policies, however, do not express such an agreement as will bring the question of the right of arbitration within the rule laid down by the lords in *Scott v. Avery*, *supra*. Where they provide, as many do, that, when parties fail to agree in regard to the amount of loss or damage, the matter shall then, at the "written request" of either party, be submitted to competent and impartial arbitrators mutually chosen, arbitration becomes contingent upon the request being made in writing;³ and even then it will not be a condition preced-

* *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N. W. 519; *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406.

³ *Ulrich v. Insurance Co.*, 4 Tupper (Can.) 84; *Phoenix Ins. Co. v. Badger*, (585)

ent, unless by some form of words it is clearly shown that an action to recover under the policy must arise on an award.⁴

It was held in *Case v. Manufacturers' Fire & Marine Ins. Co.*⁵ that, where the agreement does not provide for the number of appraisers or their mode of selection, it is too vague in its terms to secure to the company the right of arbitration; that it is only a collateral agreement; and that the insured's refusal of such demand does not deprive him of the right to sue on the policy.

This ruling I think correct, and it will be so held by the courts generally, that a covenant incorporated in a fire insurance policy, intended to secure an award, will not be enforceable unless it provides distinctly the number of arbitrators and the manner in which they shall be chosen.

§ 259. Arbitration in Case of Total Loss.

The supreme court of New York held, in *Rosenwald v. Phoenix Ins. Co.*,⁶ that the condition in a policy in regard to arbitration did not apply when the property was "totally destroyed." Notwithstanding this decision did not emanate from a court of last resort, it occasioned considerable surprise among lawyers and well-informed underwriters. The policy in that suit had the following provision: "The amount of sound value and damage to the

53 Wis. 283, 10 N. W. 504; *Wright v. Insurance Co.*, 110 Pa. St. 29, 20 Atl. 716, and 14 Ins. Law J. 713; *Wallace v. Insurance Co.*, 1 McCrary, 335, 2 Fed. 658; *German-American Ins. Co. v. Steiger*, 109 Ill. 254, 13 Ins. Law J. 546.

⁴ When the policy provides for the payment of the loss, and also provides for arbitration or appraisal, but the former is not made contingent upon the latter, the conditions are collateral, and both can be enforced; that is to say, the insured can sue for the loss, and the insurer may have his action for damages, because arbitration has been refused. *Kahn v. Insurance Co. (Wyo.)* 34 Pac. 1059; *Mutual Fire Ins. Co. v. Alvord*, 9 C. C. A. 623, 61 Fed. 752.

The policy provided that the loss should not be payable until 60 days after satisfactory proof of loss, including an award, had been received at the office of the company, but did not provide that no action should be maintainable until after an award had been had. The court held that the stipulation did not constitute a condition precedent. Its legal effect was no more than a collateral agreement.

⁵ 82 Cal. 263, 22 Pac. 1083.

⁶ 50 Hun, 172, 3 N. Y. Supp. 215.

property covered, or any part thereof, may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall then be submitted, at the written request of either party, to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement, to select an umpire," etc. It is not easy to explain how the intention of the parties could have been expressed with greater perspicuity, or how any fairly intelligent lawyer could interpret the language here used to mean that arbitration was contemplated only in event of partial loss. To a practical business man the provision is plain, and we are forced to the conclusion that the New York decision was reached with less consideration than was consistent with the importance of the interests represented in that suit.

The "general term" obviously construed the language of the policy without any clear understanding of its purpose. It appears to have entered upon the interpretation of the contract with the preconceived idea that, in the process of adjustment, the "damaged" goods are only to be considered; while it is true in a very large majority of cases that, when property is totally destroyed, the first step in adjusting is to ascertain the "sound value" of the property covered by the policy. If the destruction of the property is absolute, how else can the amount of loss be arrived at except in the manner provided, of ascertaining first the sound value,—that is, the value of the property before it was burned? And what more suitable language could have been employed to express the common-sense method of adjustment than that found in the policy in the Rosenwald suit?

Precisely this question has been discussed and decided by the supreme court of Minnesota in the case of *Gasser v. Sun Fire Office*.⁷ The claim was there set up that, the property being wholly destroyed, the condition of the policy in regard to arbitration did not apply, but the court thought otherwise. After quoting the clause of the contract which was identical with that in the *Rosenwald Case*,⁸ the court said: "This is the only provision for adjustment contained in the policy. It is clear that the same property, the value of which may in the first instance be determined

⁷ 42 Minn. 315, 44 N. W. 252, and 19 Ins. Law J. 243.

⁸ 50 Hun, 172, 3 N. Y. Supp. 215.

by agreement, is to be considered by the appraisers, whether the amount of damage be that of the full value of the property or not; that is, whether the goods are wholly or partly destroyed. * * * In the same stock of goods, many separate packages might be wholly destroyed, while others would be classed as 'damaged goods'; but the amount of damage to the property insured would include both classes, and it would hardly be reasonable to hold that the parties intended to make provision for adjusting only a part of the loss or damage to the goods, leaving no provision for the balance."

So, also, in the case of *Chippewa Lumber Co. v. Phenix Ins. Co.*,⁹ the claim there was made for lumber totally destroyed; and the trial court held, accepting the rule laid down by the supreme court of New York, that the agreement to arbitrate did not apply in case of total loss. Grant, J., writing the opinion of the supreme court of Michigan, said: "The evidence for plaintiff showed that the lumber was all destroyed, except about 19,000 feet. Counsel claimed that this was in effect a total loss, and that therefore the arbitration clause does not apply. The terms 'loss' and 'damage,' as used in the policy, are synonymous, and mean substantially the same thing. Both are included in the agreement to arbitrate, and it makes no difference whether the loss was total or partial. The language of the policy cannot be construed to limit the right of arbitration to a case where the property was damaged, but not destroyed."¹⁰

When arbitrators are chosen, they must act in good faith, and limit their investigations to the subjects of loss mentioned in the submission.¹¹ They have no authority to consider other questions than those submitted to them by the parties for whom they act, and this authority will not be extended by implication to include other subjects of controversy, unless so closely related to and so involved with the subjects named in the submission that a separation is found

⁹ 80 Mich. 116, 44 N. W. 1055, and 19 Ins. Law J. 535.

¹⁰ *Adams v. Insurance Co.*, 85 Iowa, 6, 51 N. W. 1149.

¹¹ *Connecticut Fire Ins. Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 270; *Germania Fire Ins. Co. v. Warner*, 13 Ind. App. 466, 41 N. E. 969; *Uhrig v. Insurance Co.*, 101 N. Y. 362, 4 N. E. 745, and 15 Ins. Law J. 312; *Powers Dry-Goods Co. v. Imperial Fire Ins. Co.*, 48 Minn. 380, 51 N. W. 123, and 21 Ins. Law J. 251; *Glover v. Insurance Co.*, 11 Wash. 143, 39 Pac. 380.

impossible.¹² If the inquiry is narrowed in the submission by the exclusion of other questions of difference relating to the computation of the loss, the parties will be held to have waived their rights under the policy to arbitrate such question; and it is of the same importance that the arbitrators appointed should consider every matter submitted for their judgment. If any material thing is omitted affecting the substantial rights of the parties, the award may be opened, which omissions, however, it is the duty of the complaining party to clearly and fully prove up. In the absence of any special stipulation in the submission, arbitrators are not bound to follow the strict rules of law in regard to evidence. They may form their judgment from a personal examination of the property damaged, and the evidence of their own senses, based upon an intelligent understanding of the subject, will be sufficient to sustain an award.¹³

§ 260. General Considerations.

Persons will be disqualified to act as arbitrators who are interested in the subject of inquiry, or if they have already made computation of the loss at the request of either party. They must always be prepared to act without the bias of interest or of previously formed opinions.¹⁴ The fact that a person has acted for one or the other of the parties as an arbitrator in another matter and on another occasion, or that he has frequently done so, does not affect his competency. The fact that he is an expert, on the other hand, will often

¹² The award will not be sustained if the arbitrators or appraisers exceed the powers conferred in the submission. *Skipper v. Grant*, 10 C. B. (N. S.) 237, at page 250; *Aetna Ins. Co. v. Stevens*, 48 Ill. 31, at page 33.

¹³ *Hall v. Insurance Co.*, 57 Conn. 105, 17 Atl. 356, and 18 Ins. Law J. 518; *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 20 Ins. Law J. 232.

¹⁴ *Bradshaw v. Insurance Co.*, 137 N. Y. 137, 32 N. E. 1055.

It was in evidence in case last cited that one of the appraisers had on several occasions been employed in the same capacity, and that, while considering the matter of damage, he conducted himself more like an agent or partisan than a disinterested appraiser. The words in the policy "disinterested appraiser" mean one who is not biased or prejudiced. Award held bad.

indicate his special fitness for the office, and promise more intelligent and satisfactory results.¹⁵

Arbitration provides a simple, equitable, and inexpensive method of settling questions of loss, that, from the circumstances of the case, would often confuse juries, weary courts, and cause delay and expense, that frequently would bring hardships to all concerned.

The average jurymen is not distinguished for his quick apprehension of things not found within the range of his daily experience, and will ordinarily find much difficulty in understanding evidence relating to the damage to property of which he has no personal knowledge, and which he is not permitted to examine. He is without that acute sense of perception which will enable his judgment to reach just conclusions. The ablest courts are oftentimes embarrassed with a maze of testimony, which only expert knowledge can digest and form into a tangible and consistent truth for the establishment of the right.

Out of the tangle of facts and falsehoods, out of the confused nebulae of incomprehensible things which important litigations so frequently involve, the highest wisdom of courts and juries is required to produce the miracle of an orderly creation,—a result not easily accomplished.

Arbitrators are selected on account of their special knowledge of the particular matter to be considered, and are therefore qualified to proceed understandingly. Besides, they enjoy the advantage of making their computation of the loss at the place of the fire, after intelligently and critically examining the property injured. There are no pleadings to incumber their action. There are no rules of evidence to embarrass and limit the inquiry. The ultimate fact is gained. With but little delay and little cost, a "fair deal" is secured to the parties by the improvised court,—one, too, of last resort and of their own appointing; eternal righteousness is satisfied; and the state is relieved from the burden of a controversy with which it ought not to be charged.

¹⁵ *Chandos v. Insurance Co.*, 84 Wis. 184, 54 N. W. 390.
(590)

§ 261. Performance can be Required Only within the Strict Terms of the Policy.

When either of the parties is seeking to enforce against the other an executory agreement to arbitrate, respect must be had to the terms of the policy; that is, neither the insured nor the insurer can be required to perform differently from what they have agreed to do. The demand, therefore, made by either party, will be enforced only when it is in conformity with the express agreement.¹⁶ But, when the parties voluntarily enter into a submission to arbitrate, they may depart in any particular from the form prescribed, or change the essential purpose nominated in the contract. They may modify, to accommodate their convenience, or even annul, the entire stipulation in regard to arbitration, if they so elect; but this, of course, cannot be done except by mutual agreement.

In *Hall v. Norwalk Fire Ins. Co.*,¹⁷ the loss claim was for a building damaged or destroyed by fire; and, by agreement of the parties, Henry L. Morehouse and John C. Mead were appointed to arbitrate the amount of loss. They had power to choose a third person as umpire, if necessary. Both of these persons were builders

¹⁶ When several companies join in requesting appraisal, they are asking a privilege rather than a right, as the undertaking to insure is several, not joint. If such appraisal is granted, it will not proceed under the terms of the policy. The submission will be no more than a common-law agreement, and may be rescinded by either party before award. *Harrison v. Insurance Co.*, 67 Fed. 577.

Arbitration or appraisement is not a condition precedent, unless there has been a disagreement. *Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 640, 42 N. E. 290.

There were 11 companies joining in a demand for appraisement, under different forms of policy. It was held that the demand could not be enforced, as the agreement to appraise, expressed in the policies, was several. *Connecticut Ins. Co. v. Hamilton*, 59 Fed. 258.

When insurer insists upon submission to appraisers, under different terms from those contained in policy, the insured may bring his action without first procuring award. *Summerfield v. Insurance Co.*, 62 Fed. 249; *Adams v. Insurance Co.*, 85 Iowa, 6, 51 N. W. 1149.

¹⁷ 57 Conn. 105, 17 Atl. 356.

of experience. Mead, it appears, had often been selected by insurance companies to serve as arbitrator in similar cases. They were sworn, and then proceeded to the building, which was only partially destroyed, and made such examination as they deemed important, taking measurements and obtaining from the plaintiff (who was present while they were examining the premises) such particular information in regard to the rooms and construction of the building as would enable them to act intelligently in computing the loss. After procuring this necessary data, they repaired to a room which had been procured for them, and there, acting together, made an estimate of damage, prepared and signed an award, which the plaintiff subsequently declined to accept, urging, among other things, that the arbitrators refused to hear his evidence; that they had agreed upon their award without notifying him that they were about to close the examination, and thereby cut off opportunity to introduce further evidence; that Mead was paid by the insurance company; that he had taken testimony not under oath, and in the absence of plaintiff and the other arbitrator. It did appear, however, in the trial of the suit, that the plaintiff was not denied any opportunity to bring before the arbitrators any material facts; that only an hour and a half were occupied by the arbitrators in their computations; that Mead had inquired of two joiners the price of wages in that locality; and that, when doing this, the other arbitrator was not present. The court said: "Arbitrators are not forced to follow strict rules of law, unless it be a condition of the submission that they shall do so."¹⁸ If arbitrators have acted in good faith, neither party will be permitted to avoid the award by showing that they erred in judgment, either respecting the facts or respecting the law, where the submission does not require them to follow the law.¹⁹

Again, if, as directly found in this case, persons are selected arbitrators by reason of special knowledge or skill possessed by them with reference to the matter in controversy, so that it is apparent that the parties intended to rely upon their personal information,

¹⁸ See *Remelee v. Hall*, 31 Vt. 583.

¹⁹ 6 Wait, Act. & Def. 553; *Merritt v. Merritt*, 11 Ill. 565; *Moore v. Barnett*, 17 Ind. 349; *Fudickar v. Insurance Co.*, 62 N. Y. 392; *Boston Water Power Co. v. Gray*, 6 Metc. (Mass.) 131.

investigation, and judgment, they may even be justified in refusing altogether to hear evidence.²⁰

"The inquiry made by Mead for his own information as to the price paid for labor in Wallingford, in the absence of the parties and of the other arbitrator, will not be sufficient to set aside the award, unless it appears (and it does not in this case) that the plaintiff was prejudiced, or that the decision was affected thereby."²¹ The leading case in this country respecting arbitration and award is *Boston Water-Power Co. v. Gray*.²² The opinion is by Judge Shaw. The case is a familiar one, having been cited with approval by many American and English courts. On page 170, Judge Shaw states the rule of law as follows: "The power of arbitrators denominated by the parties commissioners is to be sought in the submission, that being the instrument by which it was conferred. In expounding it, in order to ascertain the intent, every part of the instrument may be referred to,—the preamble and the recital."

And to the same import is *Herman on Estoppel*.²³ He says: "Arbitrators acquire their jurisdiction or power from the agreement to submit, and this authority must be observed. It is this alone that gives them jurisdiction."

Whether the matters submitted involve the judgment of the arbitrators concerning questions of law or fact is immaterial. The award agreed upon will be binding and final, in the absence of fraud and misconduct. It is a tribunal which the parties have themselves created, and it will be presumed that the intelligence of the arbitrators, chosen for the understanding of facts, their knowledge of the law as well as their infirmities of judgment, have been considered beforehand; and, should the award be disappointing to one or both of the parties, it will not be set aside for that reason, or because the courts would have otherwise decided. If the award expresses the honest judgment of the arbitrators, however unwise it

²⁰ *Morse*, Arb. 143; *Wiberly v. Matthews*, 91 N. Y. 648; *Eads v. Williams*, 24 Law J. Ch. 531; *Caledonian Ry. Co. v. Lockhart*, 3 Macq. 808; *Johnston v. Cheape*, 5 Dow, 247.

²¹ *Morse*, Arb. 127-167; *Straw v. Truesdale*, 59 N. H. 109; *Adams v. Bushy*, 60 N. H. 290.

²² 6 Metc. (Mass.) 131.

²³ Page 530.

may be, it is what the parties in advance have agreed to, and they must submit.

In *Boston Water-Power Co. v. Gray*, Judge Shaw again says: "As incident to the decision of the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence and the inferences of fact to be drawn from it. So, when not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matter submitted, because they are judges of the parties' own choosing. Their decision upon matters of fact and law, thus acting within the scope of their authority, is conclusive upon the same principle that a final judgment of a court of last resort is conclusive, which is that the parties against whom it is rendered can no longer be heard to question it."²⁴

During the progress of an arbitration under the insurance contract, a question of law may often arise in respect to what property is covered by the policy. Suppose the insurance to be on a building designated, and the arbitrators find certain things damaged or destroyed that are sometimes classed as "fixtures," but under slightly different circumstances are commonly regarded as part of the building. The question here presented may be one of law, or one partly of law and of fact; and the decision reached by the arbitrators will be conclusive, whether it be correct or not.²⁵ The arbitrators may do, while acting within the limitations of their authority, for the parties, all that the parties could do by agreement between themselves; and it would be an unwise and unheard-of abridgment of personal liberty to refuse persons of sound mind, whatever their limitations of knowledge and infirmities of judgment, the freedom

²⁴ *Morse*, Arb. pp. 296, 300.

²⁵ *De Groot v. Insurance Co.*, 4 Rob. (N. Y.) 504; *Hall v. Insurance Co.*, 57 Conn. 105, 17 Atl. 356, and 18 Ins. Law J. 518.

"In a submission where matters of law are not excepted, the arbitrators are sole judges of law and facts." 1 Am. & Eng. Enc. Law, 675; *Spear v. Stacy*, 26 Vt. 61; *Jackson v. Ambler*, 14 Johns. (N. Y.) 105; *Boston Water-Power Co. v. Gray*, 6 Metc. (Mass.) 131; *Smith v. Thorndike*, 8 Greenl. (Me.) 119; *Price v. Brown*, 98 N. Y. 388; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Campbell v. Western*, 3 Paige (N. Y.) 124; *Sabin v. Angell*, 44 Vt. 523; *Cutting v. Stone*, 23 Vt. 571; *Adams' Adm'r v. Ringo*, 79 Ky. 211; *Ruckman v. Ransom*, 23 N. J. Eq. 118.

to make contracts and adjust their differences in any manner that does not conflict with public policy.

But, when the submission restricts the arbitrators to a consideration of facts only, an award will not be upheld that is based upon the determination of any purely legal questions, or any questions of law and fact.²⁶

Morse on Arbitration ²⁷ says: "There are two classes of cases in which a mistake in law by the arbitrator will render his award void: First, where the submission stipulates and requires that the hearing should be conducted, or that the decision shall be made, in conformity with the rules and principles of law; second, where the arbitrators state in their award that they intend to be governed by legal principles, and ask the court to correct their judgment if it is contrary to law."

While errors of judgment will not invalidate an award, the arbitrators must confine themselves to the consideration of such matters as are expressly or impliedly included in their submission; and they must act, too, in good faith with respect to the duties they are appointed to perform. Collusion, fraud, or other misconduct will be sufficient to cause the award to be set aside.

In *Thornton v. McCormick* ²⁸ the court said: "We understand the rule to be that an award of this kind will not be set aside for error of judgment of the arbitrators, nor for a mistake which would not have had any material influence on the arbitrators in reaching their conclusions. To justify the interference of a court, there must be a showing of fraud, corruption, partiality, or misconduct on the part of the arbitrators, or some fraud on the part of the party relying upon the award, or a material mistake which entered into it. * * * Both parties agreed to abide by the judgment of the arbitrators, as it should appear in the award. Neither can now be heard to complain because it is not what they had hoped it would be."

In the case of *Goddard v. King* ²⁹ is presented the question of the finality of an award, under circumstances where the court was of

²⁶ *Bigelow v. Newell*, 10 Pick. (Mass.) 348; *White Mountains R. Co. v. Beane*, 39 N. H. 107; *Johnson v. Noble*, 13 N. H. 286; 1 Am. & Eng. Enc. Law, 675; *Estes v. Mansfield*, 6 Allen (Mass.) 69; *Walker v. Sanborn*, 8 Greenl. (Me.) 288; *Brown v. Clay*, 31 Me. 518.

²⁷ Page 300. ²⁸ 75 Iowa, 285, 39 N. W. 502. ²⁹ 40 Minn. 164, 41 N. W. 659.

the opinion that there had been an important error in the judgment of the arbitrators. The defendant had taken from the plaintiff a lease of a valuable property for a term of forty years. There was to be paid an annual rental for the first five years of \$1,000. After that, the lease provided for revaluation, and that, unless the parties could agree among themselves, the matter should be determined by arbitration. Three arbitrators were appointed, but disagreed as to the basis of valuation. An award was signed by two of them, fixing the value of the property at \$30,000, and the annual rental at \$1,500. On trial of an action to set aside the award, the court was of the opinion that the property was worth \$50,000, instead of \$30,000, as awarded, but that there was no fraud on the part of the arbitrators, and that the award could not be avoided merely because they had erred in judgment. One of the arbitrators who signed the award insisted that the proper basis of rental was the value of the property for the uses to which it was applied, and the other arbitrator who assented to the award claimed that the lease qualified or impaired the value of the property, and that the question should be considered in reference to such incumbrance. The third arbitrator, and the one who refused to sign the award, disagreed with both of his associates as to the basis of valuation, taking the position that they were only to consider the market value of the land, without reference to the lease and improvements. We quote from the opinion of the court: "The basis of valuation should have been that fixed by the third referee. * * * Where there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight, according to the extent and effect of the error and the other circumstances of the case. There might be a case of error in the award so plain and gross, and its effect might be such, that a court or jury could arrive only at the conclusion that it was not the result of an honest, impartial exercise of their judgment by the arbitrators. Such is not this case. On a matter so unstable as the value of real estate, the difference between estimates of its value by arbitrators and its value in the opinion of witnesses would have to be very great indeed, greater than it is in this case, to require a conclusion that the former is purposely wrong; and there is nothing in the evidence to suggest that either of the two referees did not

honestly believe that the theory suggested by them as the basis of valuation was the correct one. The finding complained of was justified by the evidence. Had it been necessary for the court to find, as a fact, that the referees did or did not err in their appraisal, the evidence would have required a finding in the affirmative; but it was not necessary to make a finding on that, unless the error was such as would justify a court in setting aside the award.

“Where the parties have by their agreement made the arbitrators judges between them of the law and the fact, they are bound by the decision, if fairly and honestly made, even though the arbitrators have erred in their conclusions of fact or in the law which they have applied to them. As said by this court in *Daniels v. Willis*:³⁰ ‘If their award must be made conformable to what would have been the judgment of this court in the case, it would render arbitration useless and vexatious and a source of great litigation.’ They [the courts] have only looked to see if the proceedings were honestly and fairly conducted, and, if that appears to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators.”³¹

Herman on Estoppel³² says: “The presumption is that arbitrators have acted within the scope of their submission, unless the contrary appears.”³³

§ 262. When the Stipulation to Arbitrate or Appraise is not a Condition Precedent.

When the contract only provides for appraisement or arbitration, and there is no condition expressed or implied, it is no more than a collateral agreement to appraise or arbitrate. A breach of this agreement will support a separate action, but cannot be pleaded in bar to an action on the principal contract.³⁴

³⁰ 7 Minn. 374 (Gil. 295).

³¹ *Dolph v. Clemens*, 4 Wis. 181; *Bancroft v. Grover*, 23 Wis. 465; *Bell v. Price*, 22 N. J. Law, 590.

³² On page 530.

³³ *Campbell v. Western*, 3 Paige (N. Y.) 138; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405.

³⁴ *Hamilton v. Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. 134. See, also, *Roper v. Lendon*, 1 El. & El. 825; *Collins v. Locke*, 4 App. Cas. 674; *Dawson*

The distinction between an independent and collateral agreement to arbitrate and a stipulation making arbitration precedent to a right of action is stated with terse lucidity by Sir George Jessel, in *Dawson v. Fitzgerald*. He said: "There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought until there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases, where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to bring an action for not referring, or (under a modern English statute) to stay the action until there has been arbitration." ³⁵

In *Continental Ins. Co. of New York v. Wilson*,³⁶ the stipulation contained in the policy in regard to arbitration read as follows: "Differences of opinion arising between the parties hereto as to the amount of loss or damage may be settled by arbitration, each party to select one arbitrator, and, in case of disagreement, they to select a third, and their award in writing under oath shall be binding as to the amount of loss; the cost of said arbitration to be borne by the parties hereto equally." There is nothing in the language here used to create an obligation on either part to arbitrate. The stipulation imports no more than a suggestion that, in case differences arise, they may be settled by arbitrators. It is not a covenant, much less a condition. *Strang, C.*, said: "There is nothing in the above provision to render the arbitration proceeding a condition precedent to the maintenance of an action on the policy for loss sustained under it." ³⁷

v. Fitzgerald, 1 Exch. Div. 257; *Reed v. Insurance Co.*, 138 Mass. 572; *Seward v. City of Rochester*, 109 N. Y. 164, 16 N. E. 348; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329-338, 18 N. E. 804; *Crossley v. Insurance Co.*, 27 Fed. 30.

³⁵ 1 Exch. Div. 260.

³⁶ 45 Kan. 250, 25 Pac. 629.

³⁷ This declaration of the law was sustained by the supreme court of Kansas. *Mentz v. Insurance Co.*, 79 Pa. St. 478; *Gere v. Insurance Co.*, 67 Iowa. 272, 23 N. W. 137, and 25 N. W. 159; *Canfield v. Insurance Co.*, 55 Wis. 419, 13 N. W. 252; *Nurney v. Insurance Co.*, 63 Mich. 633, 30 N. W. 350; *Wallace* (598)

The language of the provision quoted allows arbitration, but leaves it optional with the parties to the contract, and it therefore follows that either may decline.

§ 263. Neither of the Parties can Insist on Conditions in the Submission Different from Those Expressed in the Policy.

In *Hamilton v. Liverpool, L. & G. Ins. Co.*,³⁸ the insurance was on a stock of tobacco, which it was alleged had sustained damage by smoke. There were several companies interested, and, no agreement having been reached in regard to the actual loss sustained, the insurers demanded arbitration. This the plaintiff reluctantly consented to, on condition that the tobacco should be sold at public auction after it had been examined by the arbitrators, and that no award should be made until after the results of such sale were known. The insurers would not accept this condition, and notified the plaintiff, *Hamilton*, that they would not waive their option to take the tobacco at its appraised value. The plaintiff declined to arbitrate on these terms, sold the tobacco at auction, and brought suit against the defendant, as well as the other companies on the risk, to recover. The policy in suit contained a stipulation in regard to arbitration as follows: "If, at any time, differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement, and the award in writing of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this company; and until such proofs, declarations, and

v. Insurance Co., 4 McCrary, 125, 41 Fed. 742; *Schollenberger v. Insurance Co.*, Fed. Cas. No. 12,476, 7 Ins. Law J. 697; *Kill v. Hollister*, 1 Wills. 129; *Crossley v. Insurance Co.*, 27 Fed. 30, 15 Ins. Law J. 619.

³⁸ 136 U. S. 242, 10 Sup. Ct. 945; *Hamilton v. Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. 133, and 20 Ins. Law J. 97.

certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the company of the property insured, but the company reserves the right to take the whole, or any part thereof, at its appraised value." There was another clause in the policy which read as follows: "It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided."

The case was tried in the circuit court of the United States for the Southern district of Ohio, and judgment rendered for the defendant, on the ground that arbitration, when requested in writing, as it had been in this case, was a condition precedent to a right of action; that the plaintiff had no right to import any other or different condition in regard to such arbitration than those mentioned in the contract; that the condition insisted upon by plaintiff, that the tobacco should be sold at public auction after it had been examined by the arbitrators, and that no award should be made until the results of such sales were known, the defendants could properly decline to accept. Justice Gray, in delivering the opinion of the supreme court of the United States, said: "The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance, that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that, until such an appraisal shall have been permitted and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss and to the maintenance of any action. Such a stipulation, not oust-

ing the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authorities in England and in this country.³⁹

"The case comes within the general rule long ago laid down by this court: 'Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so.'⁴⁰

"Upon the evidence in this case, the question whether the defendant had duly requested and the plaintiff had unreasonably refused to submit to such an appraisal and award as the policy called for did not depend in any degree⁴¹ on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law to be decided by the court.⁴² That correspondence clearly shows that the defendant explicitly and repeatedly, in writing, requested that the amount of the loss or damage should be submitted to appraisers, in accordance with the terms of the policy, and that the plaintiff as often peremptorily refused to do this, unless the defendant would consent in advance to define the legal powers and duties of the appraisers, which the defendant was under no obligation to do, and that the plaintiff throughout, against the constant protest of the defendant, asserted and at last exercised a right to sell the property before the completion of an award, according to the policy; thereby

³⁹ *Scott v. Avery*, 5 H. L. Cas. 811; *Viney v. Bignold*, 20 Q. B. Div. 172; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Reed v. Insurance Co.*, 138 Mass. 572-576; *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. 561; *Hall v. Insurance Co.*, 57 Conn. 105-114, 17 Atl. 356.

⁴⁰ *U. S. v. Robeson*, 9 Pet. 319-327; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035.

⁴¹ *Uhrig v. Insurance Co.*, 101 N. Y. 362, 4 N. E. 745.

⁴² *Turner v. Yates*, 16 How. 14, 23; *Bliven v. Screw Co.*, 23 How. 420, 433; *Smith v. Faulkner*, 12 Gray (Mass.) 251.

depriving the defendant of the right reserved to it by the policy of taking the property at its appraised value when ascertained, in accordance with the condition of the policy. The court, therefore, rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that the plaintiff, therefore, could not maintain this action. If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented.”⁴³

Bramwell, J., in *Elliott v. Royal Exchange Assur. Co.*,⁴⁴ points out the line of distinction between the agreement to arbitrate, which is merely collateral, and will not be enforced by the courts, and an agreement that is a condition precedent, and must be performed before any right of action will exist. He says: “If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability rests to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has assessed the same, for to say to the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain, common sense, and is what I understand the house of lords to have decided in *Scott v. Avery*, supra.”⁴⁵

§ 264. The Submission should Distinctly Express the Exact Duty which the Appraisers or Arbitrators are to Perform.

As appraisers can look only to the terms of the submission for authority, the parties interested in procuring an award must see to it that the subject of inquiry is clearly stated. If anything is omitted, or any matter for the consideration of the appraisers is referred

⁴³ *Summerfield v. Insurance Co.*, 62 Fed. 249; *Adams v. Insurance Co.*, 85 Iowa, 6, 51 N. W. 1149.

⁴⁴ L. R. 2 Exch. 237.

⁴⁵ 5 H. L. Cas. 811.

to in obscure or ambiguous terms, the award will be sustained, if there has been no bad faith on the part of the appraisers, notwithstanding their judgment of the law and the facts may have been unwise. When the parties to the submission fail to bring to the attention of the appraisers in an intelligent manner the questions in dispute, the omission or obscurity of statement will be the fault of the party injured, and he will be without remedy.

In *Chandos v. American Fire Ins. Co.*,⁴⁶ appraisers were chosen, to whom schedules were presented containing the different items on which loss was claimed. From these schedules were omitted a bridge or tramway and other items of considerable value. It was a matter of some doubt whether this particular property was included among the subjects of insurance. The court said: "As to the omission from the award of the items named, it is not at all certain that they are embraced within the description of the property insured, and there is no evidence conclusive of the question. The schedule submitted by the assured to the appraisers did not contain these items, nor did the assured request the appraisers to appraise them, or call their attention to any such omission. If they ought to have been specially considered by the appraisers, and were not, it was the fault of the assured, of which she ought not to complain. There is nothing in the description of the property that would embrace or suggest these items. The appraisers are presumed to have used their best judgment in ascertaining what particular items of property were embraced in the words 'of general description,' and their decision of the question is final and conclusive."⁴⁷

§ 265. In the Submission There should be no Substantial Departure from the Agreement of the Parties as Expressed in the Policy.

The stipulations contained in the policy form the basis of a submission to appraise, and, in the subsequent agreement to submit,

⁴⁶ 84 Wis. 184, 54 N. W. 390.

⁴⁷ *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Burchell v. Marsh*, 17 How. 349; *Morse*, Arb. 296; *Sharman v. Bell*, 5 Maule & S. 504; *Rundell v. La Fleur*, 6 Allen (Mass.) 480; *Fudickar v. Insurance Co.*, 62 N. Y. 392; *Boston Water-Power Co. v. Gray*, 6 Metc. (Mass.) 131.

there should be no important departure from the provisions of the policy. When this occurs, the courts are not entirely in accord in regard to the manner or to what extent the rights of the parties have been affected.

In *Adams v. New York Bowery Fire Ins. Co.*,⁴⁸ the policy required that after the appraisers were appointed, and before they proceeded to consider the damage, they should select an umpire, but this selection was deferred until a disagreement arose between the appraisers first chosen. This failure to perform literally in this particular, as the policy provided, the court held to be fatal, and that the obligation created by the terms of the policy to appraise had been waived. I find no other case where so extreme a rule of literal performance has been approved by the courts.

The same principle of construction was urged by plaintiffs in *Chandos v. American Fire Ins. Co.*⁴⁹ In regard to the time and manner of selecting an umpire, Justice Orton, who wrote the opinion, said: "It is the duty of the appraisers, and not of the parties; and, if they neglected it, it was no fault of either party. If the parties are responsible for the omission, they both waived it, being present, and not requiring the appraisers to make the selection. In the submission they say that, 'in case of disagreement, the said appraisers shall select a third, who shall act with them in matters of difference only.' This is a waiver of record, and both parties ought to be estopped, and such is clearly the law."⁵⁰

§ 266. Award is Made a Condition Precedent Only When a Prescribed Line of Action is Consistently Followed.

In states having statutory policies, and where the form and manner of appraisal are prescribed and mandatory, the very strict rule adopted by the Iowa court will presumably be the proper one to follow. After the occurrence of a fire, the parties interested are competent, no doubt, to make such arrangements in regard to the computation of the loss as will be best suited to their convenience, irrespective of the fact that the policy authorizing the proceedings

⁴⁸ 85 Iowa, 6, 51 N. W. 1149.

⁴⁹ 84 Wis. 184, 54 N. W. 390.

⁵⁰ *Morse*, Arb. 341; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377; *Mullins v. Arnold*, 4 Sneed (Tenn.) 262; *Butler v. Mayor, etc.*, 1 Hill (N. Y.) 489.

is of a statutory character. They may proceed under the terms of the policy, or ignore them altogether; but, if the insurer intends to rely upon that clause of the policy which makes award a condition precedent, it must act in reference to all the proceedings concerning appraisal in such manner as to substantially conform to the provisions of the policy. Award is made a condition precedent only when a prescribed line of action has been consistently followed. There can be no material departure from the terms of the policy, and at the same time an insistence upon its privileges and restrictions. If the submission to appraisers is outside of the policy, it is subject to the same rules that govern in other common-law agreements, and may be revoked or rescinded by either the insured or insurer at any time before an award, and the party injured will have his action for damages only.

This view of the law finds support in the case of *Broadway Ins. Co. v. Doying*.⁵¹ The record there shows an important variance between the policy stipulations and the submission to appraisers, and the court said: "This agreement was substituted for the appraisal clause of the policy, and, being somewhat different from it, in effect abrogated it. Whether, therefore, the appraisal was such as the policy required, was immaterial. An appraisal made under the agreement was, according to its terms, binding on the parties."

The award in this case was signed only by the appraiser selected by the insured and the umpire. There had been several meetings to consider the question of damage, at which both the appraisers first selected had been present; but, no agreement having been reached, the insured's appraiser appointed another meeting, but the appraiser chosen by the company, for unexplained cause, did not appear, and thereupon the assured's appraiser and the umpire computed the damage, and signed an award. Had there been ultimately no agreement, and the appraisal had been defeated without fault of either party, the insurer, having in the submission consented to abandon the provisions of the policy in regard to appraisers, could not, as a defense to a suit on the policy, successfully plead that appraisal and award were a condition precedent, and that there had been no performance.

⁵¹ 55 N. J. Law, 569, 27 Atl. 927.

§ 267. When Award is Defeated by the Arbitrary Insistence of Either of the Appraisers on the Performance of Unjust or Unreasonable Things, the Misconduct of Such Appraiser will be Chargeable to the Party by Whom He was Selected.

In *McCullough v. Phoenix Ins. Co. of Hartford*,⁵² by the terms of the policy, appraisement and award were to precede payment, and a condition on which suit could be maintained. The parties differed as to the amount of loss, and appraisers were chosen, who failing to agree in respect to the matter of damage, an effort was made to select an umpire. In this undertaking much time was consumed, and no results secured, each party claiming that the endeavor put forth by the other had not been made in good faith. It was in evidence that the appraiser appointed by the defendant refused to agree to any person for umpire who lived in the vicinity of the loss, and that the names he submitted for the consideration of the plaintiff's appraiser were of persons who resided 200 miles distant from the place of fire. The court said in reference to the course pursued by this appraiser: "His action under the circumstances, to say the least of it, is not to be commended, was unreasonable, unjust, and tantamount to a refusal to proceed with the appraisement." And it was held that the suit to recover on the policy was properly brought before an award.⁵³

This decision presumably rests on the conclusion which the court reached from evidence in the record that defendant's appraiser had

⁵² 113 Mo. 606, 21 S. W. 207.

⁵³ In *Brock v. Insurance Co.*, 102 Mich. 583, 61 N. W. 67, the claim arose under the terms of the Michigan standard policy. There was a failure to agree, and appraisers were chosen. The person selected by the claimant lived in the neighborhood of the loss, while the insurer nominated a person who resided about 130 miles away. These appraisers thus selected could not agree in the appointment of an umpire. The insurer's appraiser named three persons, all of whom lived remote from the place of loss. The claimant's appraiser named 12 persons in the vicinity of the loss, as to whom no objections were made, except because of locality. The court held that it was unreasonable to require claimant's appraiser to go a long distance in order to ascertain whether the persons thus nominated for umpire were competent to act, and that the refusal of the insurer's appraiser to accept an

acted in bad faith, and that the completion of the appraisal had been defeated through his contumacious and unreasonable insistence on the selection of a stranger for the umpire. There is nothing in the nature of the business or the agreement of the parties to confine the selection of appraisers to the neighborhood of the loss. It will sometimes, no doubt, occur that a more intelligent judgment of the loss can be formed by persons familiar with its locality, and who may have had more or less knowledge of the value and character of the property before the fire. On the other hand, there will often be found local interests or prejudices that may properly be considered as likely to influence the decision of the appraisers, and prevent an impartial award. It will frequently happen, too, that a wise and just assessment of damage requires expert knowledge, which is not available in the vicinity of the fire. We may suppose large and expensive buildings erected in small towns, where only unskilled labor can be found, or there may be costly and intricate machinery, manufactured by specialists, the uses and construction of which are understood only by a few persons, who perhaps live in a remote place, and who alone could form an intelligent opinion in regard to the loss or damage it had sustained by reason of the fire. The question of competency must always be determined by the test of whether the person appointed is fair-minded and skillful, and it is not important where he lives. Neither party can arbitrarily insist upon their preferences in respect to residence, and when this is done, under circumstances that show the insistence to be unreasonable, it will justify the conclusion reached by the Missouri court, that the purpose in view was to prevent the appraisal being completed. Bad faith by either party excuses the other from further performance in the matter, and this, I think, is the full significance of the decision referred to, of the Missouri court.

umpire in the vicinity of the loss was equivalent to a refusal to proceed with the appraisal.

It was held in *Hickerson v. Insurance Co. (Tenn.)* 33 S. W., at pages 1042, 1043, that when the insurer acts perversely or in bad faith, defeating the selection of an umpire, it waives its right to appraisal, and the insured, without first obtaining an award, will have his action to recover on the policy.

§ 268. Submission may be by Parol unless the Policy Otherwise Provides.

Unless otherwise specifically required by the terms of the policy, the submission to arbitrate may be by parol.⁵⁴ A written submission is important only as furnishing the highest character of evidence of the agreement between parties. For this reason, a written submission is always preferred; but, if refused by either party, it will be sufficient to sustain an award if the arbitrators are properly sworn, and proceed to ascertain the amount of damage on the authority given by parol. In such case, especial care should be taken that the assent of the parties is distinct. The arbitration may then proceed under the original stipulations expressed in the policy, and the arbitrators can refer to that instrument for information and guidance in the performance of their duty. When the reference is in this manner, and there has been a failure to particularly define or limit the authority of the arbitrators, they may construe the language of the policy in regard to the subjects of insurance in such manner as to either increase or diminish the insurer's liability; and, if such discretion is exercised in good faith, the award will be sustained, notwithstanding the arbitrators may have erred as to the legal effect of the language construed.⁵⁵

§ 269. Whatever the Appraisers do in Excess of Their Authority will be Void.

In respect to any particular matter, where the submission clearly defines the questions appraisers are appointed to consider, they will have no discretion to act in reference to other questions, and whatever they may do in excess of their authority will not only be void, but in most cases will render the entire award bad.⁵⁶ The courts,

⁵⁴ Greer v. Canfield, 38 Neb. 169, 56 N. W. 883; 1 Am. & Eng. Enc. Law, 655; Koon v. Hollingsworth, 97 Ill. 52.

⁵⁵ Chandos v. Insurance Co., 84 Wis. 184, 54 N. W. 390; Boston Water-Power Co. v. Gray, 6 Metc. (Mass.) 131.

⁵⁶ Howard v. Edgell, 17 Vt. 9; Brown v. Hankerson, 3 Cow. (N. Y.) 70; Collins v. Freas, 77 Pa. St. 493; Squires v. Anderson, 54 Mo. 193; Gibson v. Powell, 5 Smedes & M. (Miss.) 712; Richardson v. Huggins, 3 Fost. (N. H.)

when called on to enforce performance under an award, will generally decline to distinguish that which is good from that which is bad, preserving the one, and rejecting the other. But when the arbitrators have misunderstood their duty, or been guilty of misconduct by omitting things they should have considered, or including things not referred to them in the submission, the award will not be sustained; that is, the whole award will fail. Their appointment relates to the performance of a particular duty, and when acting in reference to such duty, and only then, will their acts bind the principal. It often occurs, however, that the submission is indefinite in respect to some important subject; and in such case the arbitrators may decide, as a matter of law, questions affecting substantial rights that were not particularly mentioned in the submission.

This was held in *Chandos v. American Fire Ins. Co.*⁵⁷ In that case it was submitted to appraisers to ascertain the loss to "pulp mill building and additions thereto, including flume." There was a bridge and tramway connected with the building, and it was claimed by the insured that the award was bad, as the value of the bridge and tramway was not included. The Wisconsin court thought differently. Judge Orton, who wrote the opinion, said: "The schedule submitted by assured to the appraisers did not contain these items, nor did the assured request the appraisers to appraise them, or call their attention to any such omission. If they ought to have been specially considered by the appraisers, and were not, it was the fault of the assured, of which he ought not to complain. There is nothing in the description of the property that would embrace or suggest these items. The appraisers are presumed to have used

106; *Butler v. Mayor, etc.*, 7 Hill (N. Y.) 329; *Wright v. Wright*, 5 Cow. (N. Y.) 197; *Blanton v. Gale*, 6 B. Mon. (Ky.) 260; *Reynolds v. Reynolds*, 15 Ala. 398; *Smith v. Kincaid*, 7 Humph. (Tenn.) 28; *Lee v. Onstott*, 1 Ark. 206; *Stevens v. Gray*, 2 Har. (Del.) 347; *Sessions v. Barfield*, 2 Bay (S. C.) 94; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Huff v. Parker*, cited in 4 Dall. 285; *Lyle v. Rodgers*, 5 Wheat. 394; 1 Am. & Eng. Enc. Law, 676.

Where the submission designated that arbitrators were to consider and decide only the question of loss, they were given jurisdiction of no other matter. *Germania Fire Ins. Co. v. Warner*, 41 N. E. 969, 13 Ind. App. 466. *Connecticut Fire Ins. Co. of Hartford v. Hamilton*, 8 C. C. A. 126, 59 Fed., at page 270.

⁵⁷ 84 Wis. 184, 54 N. W. 390.

their best judgment in ascertaining what particular articles or items of property were embraced within the words of general description, and their decision of the question is final and conclusive."

§ 270. Appraisers may Construe Contracts and Pass upon Other Questions of Law When Necessary in the Performance of the Duties Submitted.

There is, I think, an important principle of law involved in this matter, to which Judge Orton does not refer, and which I wish to point out and emphasize. It is shown by the record that the exact language of the policy describing the property insured was incorporated into the submission. A more particular description, therefore, was not called for, and would have been impertinent. The appraisers were required to award damage on "pulp-mill building and additions thereto." It was competent for the appraisers to decide the question of law here presented, whether the bridge and tramway in controversy was a part of the additions to "mill building"; and it must be presumed that they did so decide, and such decision was "final and conclusive." In a case of this kind, where the submission contains general words of description, the appraisers or arbitrators have the power to construe; and whatever conclusion they reach as to the scope and meaning of such words, if acting with good faith, cannot after an award be questioned by the parties in interest.

Chief Justice Shaw, in deciding *Boston Water-Power Co. v. Gray*,⁵⁸ said: "In general, arbitrators have full power to decide upon questions of law and fact which directly or incidentally arise in considering and deciding the questions embraced in the submission. When not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matter submitted, because they are judges of the parties' own choosing."⁵⁹

⁵⁸ 6 Metc. (Mass.) 131.

⁵⁹ When questions of construction are submitted, either in express terms or by clear implication, the arbitrators may decide. For example, suppose the descriptive portion of the policy is copied literally into the submission, as is frequently done. The arbitrators or appraisers then are empowered to

§ 271. Good Faith is Required in All Things, from the Submission to the Award.

Good faith is required in all things relating to arbitration. Fraudulent representation or concealment will be sufficient ground for setting aside the award.⁶⁰ In a recent New York case (*Bradshaw v. Agricultural Ins. Co.*)⁶¹ the agent of the insurer nominated for appraiser a person from a distant city, who was unknown to the insured, and, as appears, was reluctantly accepted by him, on the representation of the company's agent that he was disinterested and a fair-minded, competent man. The question of his competency in these particulars was put in issue, and the jury found that, while he was disinterested in respect to any pecuniary matter, he was interested for the defendant company in another manner, in such a degree as to unfit him for the service required, and to make the representations before referred to fraudulent. It was in evidence that the nominee of the insurer had on frequent occasions served as appraiser in its behalf, and that, in connection with this particular appraisement, he had shown a bias of interest which proceeded from the character of his employment; that, in fact, he had acted less as an arbitrator and judge than as a partisan and attorney. The court held that the evidence was sufficient to sustain the verdict that the defendant's appraiser was not disinterested. But, to avoid misconception, it should be carefully observed that the award was held

consider and award the damage sustained to the property designated, and, should any doubt exist as to the particular property intended to be covered, it will be for the arbitrators to decide. Suppose, for illustration, the policy was written to cover "fixtures," and the question should arise, as it often does, whether certain articles were chattels, fixtures, or realty. This would be a question of law, and one which arbitrators or appraisers would have undoubted authority to consider and finally determine. 1 Am. & Eng. Enc. Law, 676; *Cranston v. Kenny*, 9 Johns. (N. Y.) 212; *Forbes v. Turner*, 54 Ga. 252; *Greenough v. Rolfe*, 4 N. H. 357; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Campbell v. Western*, 3 Paige (N. Y.) 124; *Kleine v. Catara*, 2 Gall. 61, Fed. Cas. No. 7,869; *Smith v. Smith*, 4 Rand. (Va.) 95.

⁶⁰ *Braddy v. Insurance Co.*, 115 N. C. 354, 20 S. E. 477. Fraud renders award bad. *Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633.

⁶¹ 137 N. Y. 137, 32 N. E. 1055.

bad on account of the fraudulent representations of the defendant's agent. The fact that the appraiser nominated by the company had repeatedly been employed in that capacity on other occasions was no disqualification, unless such fact was fraudulently withheld.

This question was before the court in the case of *Chandos v. American Fire Ins. Co.*, supra. The record there showed that two of the arbitrators chosen by the company were experts, and had many times been called to appraise losses, being selected usually by insurance companies. With this evidence before it, the court said: "The fact that these two appraisers agreed with the two selected by the assured in every particular is sufficient evidence that they were not partial or corrupt, and that their award is just and fair."

A share owner in a stock company is not disqualified, on account of his interest, from serving as arbitrator or appraiser in a matter between the company and another. So, too, it was held in a Massachusetts case (*Bullman v. Commercial Union Assur. Co.*)⁶² that an indorser on an unmatured note was not a "creditor of the insured," in such a sense as would justify setting aside an award, where such insurer had acted as one of the three appraisers. The policy in that case was the Massachusetts statutory form, and provided for the selection of "disinterested" persons for appraisers. The one who had indorsed the note was the umpire, and had been selected by the two appraisers first chosen. There was no proof that he had acted unfairly, and the court said that it could not hold, as a matter of law, that he was not disinterested.⁶³

⁶² 159 Mass. 118, 34 N. E. 169.

⁶³ An appraiser is incompetent if he have such interest in the controversy as will in any respect influence his judgment. 1 Am. & Eng. Enc. Law, 672.

Award will not be set aside because one of the appraisers has acted as attorney for one of the parties in another matter. *Goodrich v. Hulbert*, 123 Mass. 190.

Ordinarily, the relations of debtor and creditor will not be sufficient to disqualify persons from acting as arbitrators. *Chicago & M. L. S. R. Co. v. Hughes*, 28 Mich. 186; *Morgan v. Morgan*, 1 Dowl. 611.

Circumstances, however, must be considered in reference to the influence which personal or family interests would be likely to have on the judgment of the arbitrator. *Rand v. Redington*, 13 N. H. 72; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *Fisher v. Towner*, 14 Conn. 26.

Good faith requires the disclosure of any important fact affecting the capacity of the arbitrator to act impartially. If there is concealment in respect

In *Adams v. New York Bowery Fire Ins. Co.*,⁶⁴ the policy provided that the arbitrators chosen by the parties should appoint an umpire before proceeding to consider the question of loss, while the submission subsequently entered into stipulated that the two arbitrators selected by the plaintiff and the defendant insurance company should choose an umpire only in case of disagreement. The Iowa court, in discussing the case, calls attention to the different and conflicting provisions of the policy and the submission; and while there is some confusion and obscurity in the language of Judge Kinne, who wrote the opinion, the court is understood to have held that, as the submission differed from the policy stipulation in an important particular, the award made could not be upheld. The court said: "The submission and award pleaded, not being in accordance with the terms of the policy, are no defense to this action." The learned judge who wrote the opinion did not disclose the reasoning by which this conclusion was reached, and, as the decision appears to stand wholly unsupported by authorities, it is not probable that it will be followed in other jurisdictions.

The Wisconsin court, in *Chandos v. American Fire Ins. Co.*, *supra*, had before it for consideration this same question. The Iowa case was there referred to, and its doctrine urged by plaintiff's attorney, but the court refused to accept it as an authority. Indeed, it distinctly repudiated the principle, as embodying neither law nor reason. It said: "We cannot follow such an authority to set aside an award by arbitrators, for such a merely technical omission."

As this *Chandos Case* was one involving a large sum of money, and the contest between the parties had been a long and persistent one, we may fairly presume that the court had given its very careful attention to the consideration of the points of law in dispute. Its discussion, therefore, will be of special interest, and the conclusions

to family or partisan interests, it may be the duty of the court to inquire to what extent such interests have influenced the award. *Brown v. Leavitt*, 26 Me. 251; *Pool v. Hennessy*, 39 Iowa. 192; *Wheeling Gas Co. v. City of Wheeling*, 5 W. Va. 448.

An appraiser must not be so much of a partisan that he cannot consider fairly and decide impartially the matters mutually submitted. To be so is to be incompetent, and any award secured by his partisan zeal, tainted with perjury, will be bad.

⁶⁴ 85 Iowa, 6, 51 N. W. 1149.

reached accepted with confidence. In reference to this particular question, the court said: "The omission of the appraisers to first appoint an umpire before they proceeded to appraise the loss does not invalidate the award. The provision of the policy is that 'the two appraisers so chosen shall first select an umpire to act with them in case of their disagreement, * * * and the award of any two in writing, under oath, shall be binding and conclusive,' etc. Such third person is not strictly an umpire. An umpire acts alone in hearing the whole case de novo in case of disagreement of the arbitrators. He is a third arbitrator, to be called in to act with the others after disagreement, and then any two of them make the award."⁶⁵ * * * The appointment of an umpire "is the duty of the appraisers, and not of the parties; and, if they neglected it, it was not the fault of either party. If the parties are responsible for the omission, then they both waived it, being present, and not requiring the appraisers to make the selection. In the submission they say that, 'in case of disagreement, the said appraisers shall select a third, who shall act with them in matters of difference only.' This is a waiver of record, and both parties ought to be estopped, and such is clearly the law. Where an umpire, strictly speaking, has been appointed, and should have acted alone, and he acts with the arbitrators, and joins with them in making the award (a very material departure from the submission), the parties present consented to it, and thereby waived all objection to it."⁶⁶ * * * The umpire here can act only after disagreement with the arbitrators. Until then an umpire is not necessary. He can act as well, and with the same effect, if appointed when such a contingency occurs. The time, therefore, fixed in the contract, is not essential or material. There is only one case to be found in which it is held that this omission to appoint an umpire before the arbitrators entered upon their duty in such a case invalidated the award. That case is *Adams v. New York Bowery Fire Ins. Co.*"⁶⁷

⁶⁵ Morse, Arb. 241.

⁶⁶ Morse, Arb. 341; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377; *Mullins v. Arnold*, 4 Sneed (Tenn.) 262; *Butler v. Mayor, etc., of New York*, 1 Hill (N. Y.) 489.

⁶⁷ 85 Iowa, 6, 51 N. W. 1149.

§ 272. The Duties of the Appraisers are Judicial. Nothing can be More Improper in the Appraiser than the Character of Agent or Attorney.

The judicial character of an arbitrator should not be lost sight of. When sworn to impartially consider the matters submitted, the law will presume arbitrators to act with fairness, and irrespective of special advantage to either party to the submission. The selection of one of the arbitrators by A. and another by B. does not justify the persons designated in becoming advocates of the different parties by whom they were chosen. Both must proceed to inquire concerning the matter with the same indifference to personal advantage of the several parties, by whom they were appointed, as would be the case if A. and B. were strangers to the arbitration, or had the choice of arbitrators been made by some independent power. The law will presume the arbitrators to conduct their investigations consistent with the obligations imposed and accepted. Misconduct on the part of either cannot be chargeable to the parties to the submission, and the rights of neither can be prejudiced, unless collusion can be shown. When collusion or fraud is shown, the party injured may revoke the submission, and refuse to be bound by the award; and this irrespective of the fact that the arbitrator guilty of misconduct is the one whom the injured party has selected. Persons to whom a difference is thus referred, if agents in any sense, are not such as will make the principal responsible for their misconduct.

Where it is set out as a defense to the action for recovery on a policy that there has been a submission to arbitrators, the defense will not be sustained if it is shown that the submission entered into was substantially different from the one contemplated by the terms of the policy.

In *Adams v. New York Bowery Fire Ins. Co.*,⁶⁸ supra, the policy provided that the appraisers first appointed should, before entering upon the investigation, select an umpire. This was not done, as it was perhaps supposed that there would be no disagreement, in which case the selection of an umpire would be unnecessary trouble and expense. The policy also provided that the appraisers should

⁶⁸ 85 Iowa, 6, 51 N. W. 1149.

determine the amount of loss, while under the terms of the submission the appraisers were only authorized to assess damages that had been sustained by such of the insured property as was partially destroyed. The value of the property wholly burned was withheld from their consideration. The court held that these were "fatal variations," and that "the submission and award pleaded, not being in accordance with the terms of the policy, were no defense to the action."

§ 273. General Considerations.

The authority of arbitrators is all expressed in the submission. By its terms, performance is both required and limited. The arbitrators may do no less nor more. If any material thing is omitted or added, the award will be bad. In *Adams v. New York Bowery Fire Ins. Co.*,⁶⁹ Kinne, J., said: "It appears that the schedule accompanying the submission as made out included many articles which were not appraised, and other articles embraced within the schedule were held by the appraisers not to be covered by the terms of the policy; hence were not appraised. Clearly, the appraisers were not authorized to exercise their judgment as to what was or was not included within the policy. That was a matter the parties themselves had already determined by the terms of the submission and the schedule which was placed in the appraisers' hands. They were to appraise certain articles. They only appraised a part of them, and they undertook, without a shadow of authority, to determine that certain articles in the schedule were not covered by the policy. Under such circumstances, to hold the award binding (even if the submission had followed the terms of the policy) would not effectuate the intent and agreement of the parties, as evidenced by the submission and the accompanying schedule. The law is well settled that an award will be set aside for such material mistakes and errors as prejudice either party, and it will also be set aside if the arbitrators 'omit to consider matters which were submitted to them.'" ⁷⁰

When the policy provides specifically how the arbitrators shall be chosen, and the manner in which the inquiry shall proceed, sub-

⁶⁹ *Supra.*

⁷⁰ *Thompson v. Blanchard*, 2 Iowa, 44.

stantial compliance with its provisions will be indispensable. When an award is made a condition precedent to the commencement of suit, it is such an award as the policy itself provides for, and procured in the manner there particularly designated. Any material departure from the terms of the policy, in respect either to the manner of selecting the arbitrators or the subsequent performance of their duties, imports that the parties have made a new contract, containing different provisions, and that their rights under the former one are waived. Should the insured elect to revoke his subsequent agreement to arbitrate, he may do so, and bring suit on the policy. He would undoubtedly be liable to the insurer in damages for a breach of contract, but the bar to bring a suit "until after an award has been obtained" is removed by the waiver of the specific provisions concerning arbitration, contained in the original contract. As waiver cannot be recalled, the parties will stand in new and different relations, and both must find their remedies within the terms of the subsequent agreement.⁷¹

The courts will not excuse bad faith in arbitration proceedings. When the subject of difference has been submitted, the arbitrators must be allowed to exercise with freedom their own judgment of the facts. The parties interested may, of course, present to all the arbitrators, when considering the matter together, both evidence and argument. At such time and in such manner proper methods to convince and influence the mind of the arbitrators will be permitted, but it will be misconduct for either of the parties, when the other is not present, to discuss the questions in controversy with either of the arbitrators alone. When the umpire is to be selected by the two arbitrators first chosen, it will be held bad faith for the parties, acting separately, to so far urge their own personal preferences as to either prevent or influence an appointment.

In *Powers Dry-Goods Co. v. Imperial Fire Ins. Co.*,⁷² referring to an attempt of the adjuster to influence the judgment of one of the arbitrators in selecting an umpire, the court said: "But he had no right to assert his mere will, preference, or disapproval to control the choice, in which, by the terms and spirit of the contract, neither of the parties was to have a voice. The agreement contemplated that the two arbitrators alone should select the umpire in the exer-

⁷¹ *Adams v. Insurance Co.*, supra.

⁷² 48 Minn. 380, 51 N. W. 123.

cise of their judgment and discretion, uncontrolled by the interested parties. It was of the very essence of the agreement that the latter should not choose or reject or assert their preferences or objections. If the defendant, by expressing to the arbitrator whom it had chosen its disapproval of the selection of particular persons, as by saying that such persons would not act impartially, led him to defer to its will, and so influenced him that, by reason of such interference, he did not agree with his fellow arbitrator in the selection of an umpire, when otherwise he would have done so, the failure of the proposed arbitration is attributable to the fault of the defendant, and the plaintiff had the right to pursue its legal remedy at law."

In another case decided by the supreme court of Minnesota,⁷³ the policy provided that, when there had been a failure to agree in regard to the amount of loss, no right of action should exist until after an award had been obtained. The facts stated, in the opinion of the court, show that there had been a disagreement, submission, and award; but the latter, being unsatisfactory to the insured, was ignored, and suit brought to recover on the policy. The complaint contained a general averment that plaintiff had complied with all of the terms and conditions precedent which he was required to perform, but there was a failure to allege specifically the appointment of appraisers and the subsequent award agreed upon. The complaint was wholly silent as to these matters. The court held this to be bad pleading, inasmuch as it did not set forth facts which, if established by sufficient evidence on the trial, would excuse performance in respect to the award. Collins, J., said: "It is obvious that no cause of action was stated on an award, and none in avoidance of an award, and that nothing was alleged which excused or relieved the plaintiff from abiding by terms and conditions of the policy in reference to an appraisal and an award. The complaint was therefore defective, in that it failed to state facts sufficient to constitute a cause of action."

⁷³ Mosness v. Insurance Co., 50 Minn. 341, 52 N. W. 932.

§ 274. A Submission to Appraisers is not a Waiver of Other Defenses within the Terms of the Policy.

When arbitration has been had, and no award agreed upon, the insurer may still avail itself of defenses, under the conditions of the policy, of which it had knowledge at the time the arbitration was entered upon. This was held by the supreme court of Minnesota in *Johnson v. American Ins. Co.*⁷⁴ The policy in that case provided, in substance, that, when differences should arise in regard to the amount of loss, the matter should be submitted to impartial arbitrators, mutually chosen, "whose award in writing shall be binding on the parties as to the amount of such loss or damage, but *shall not decide the liability of the company under this policy.*" The trial court instructed the jury that, as the plaintiff had been subjected to expense and trouble on account of the arbitration, in its insistence upon that method of determining the amount of loss the defendant had waived its right to claim that the policy was void by reason of any facts of which it then had knowledge. Dickinson, J., said: "This is opposed to the express agreement of the parties, as we construe that part of the policy above referred to. The contract contemplates and gives to either party the right to demand an arbitration and final adjustment of the amount of the loss merely, distinct from any question which may arise as to the legal liability of the insurer, leaving that to be determined in some other manner. The language which we have italicized was employed with obvious reference to arbitration and award as to the amount of loss or damage, and was intended to have some practical effect in such a case; yet it would be practically nullified if it were held that the mere fact of submitting the question of the amount of loss to arbitration would be effectual to preclude the insurer from thereafter bringing in question its legal liability under the policy."

⁷⁴ 43 N. W. 59, 41 Minn. 396, and 18 Ins. Law J. 724; *Briggs v. Insurance Co.*, 65 Mich. 52, 31 N. W. 616.

§ 275. When the Insurer has Acted in Good Faith, a Failure to Obtain an Award will not Give the Insured a Right to Bring Suit on the Policy.

When, by the terms of the policy, no right of action will exist until an award is obtained, fixing the amount of the loss, a failure of the arbitrators, mutually chosen, to agree upon such an award, will not give to the insured a right to sue on the policy. In the absence of bad faith or acts intended to defeat arbitration on the part of the insurer, the party seeking the enforcement of the contract must propose the selection of other arbitrators, to the end that an award may be agreed upon; and this course must be persisted in until persons are found for arbitrators sufficiently intelligent and fair-minded to unite upon an equitable basis of computation.⁷⁵

It may be argued that if the insured is without a remedy, in case no agreement of the arbitrators is ultimately reached, he will suffer hardship which the courts ought to relieve. It is, of course, possible that a claim for loss might be defeated altogether on account of the failure of the arbitrators to return an award; but it is not apparent in what manner the courts can, in such case, afford relief to the suffering party. It may often occur that, in executing the terms of a contract, unforeseen difficulties will arise, that will cause hardship and perhaps even injustice to either one party or the other; but the courts are as powerless as the parties themselves to provide a remedy. Notice and proofs of loss are generally conditions precedent. When this is the case, the courts cannot excuse performance. The contract must be enforced as made by the parties thereto, and, when they have agreed that no right of action shall arise except on an award, it is indispensable that an award be had, unless it can be shown in excuse that arbitration has been defeated through some fault of the insurer.

⁷⁵ *Old Saucelito Land & Dry-Dock Co. v. Commercial Union Assur. Co.*, 66 Cal. 253, 5 Pac. 232; *Davenport v. Insurance Co.*, 10 Daly (N. Y.) 535; *Morley v. Insurance Co.*, 85 Mich. 210, 48 N. W. 502, and 20 Ins. Law J. 577; *Chapman v. Insurance Co.*, 89 Wis. 572, 62 N. W. 422.

In *Campbell v. American Popular Life Ins. Co.*,⁷⁶ payment of the loss was by the terms of the policy made conditional on the opinion of the surgeon general of the company that the insured did not die from intemperance. The court held this to be a valid provision and a condition precedent. The question was one of much difficulty, because of the fact that the liability of the company was made to depend on the favorable opinion of an officer engaged in its service, and the payment was practically made contingent on the will of the insurer. The conclusion finally reached by the court was that the meaning of the contract was plain, and that they had no power to change its terms.

It is a common provision of the fire insurance policy that, in the event of a loss, the insured must procure a certificate of the nearest magistrate, setting forth that he has examined the circumstances of the fire, and verily believes that the insured has suffered, without fraud and evil practice, loss to the amount claimed. This provision has been sustained almost without exception, and it may sometimes happen that an honest and deserving claimant will be unable to furnish the stipulated proof of loss, because he is refused the certificate of the nearest magistrate. When this occurs, there is no remedy. The parties have agreed in the one case that the company should not be liable to pay the loss unless there should be furnished, as a part of the proofs, such certificate, and in the other case that no right of action shall exist until after an award has been made, fixing the amount of loss. In both instances recovery is made to depend upon the assent and agreement of disinterested persons. It may be fairly presumed that these provisions of the insurance contract do not often occasion hardship or injustice, nor is the situation so exceptional in its character as to demand special measures of relief. The insured seeking to enforce his rights in a suit at law always, of course, takes his chances of the disagreement of a jury.

In the case of *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*,⁷⁷ the contract between the parties stipulated that the tolls should be fixed by arbitration in case they failed to agree between themselves. Each was to select one of the arbitrators, and the two

⁷⁶ 1 MacArthur, 246.

⁷⁷ 50 N. Y. 250.

so chosen should select the third. Allen, J., in delivering the opinion of the court, said: "The defendant only undertook to pay such rate of toll as should be established as prescribed in the instrument, and cannot be compelled to acquiesce in the determination in any other manner; and, until a toll is established, no liability is incurred under the contract or right of action given." Morse on Arbitration ⁷⁸ says: "The duty of procuring the decision of the referee in a case like the foregoing rests primarily upon the party who will have the claim for payment; i. e. upon the plaintiff in the suit to be brought after the right of action shall have accrued. He must use his best exertions to bring about and perfect the agreement of reference; and it seems that his failure to bring it about will enable him to institute suit without it only in case the obstacle to his success has grown out of the contumacious action of the other party."

§ 276. When Arbitration and Award are Conditions Precedent, There will be No Right of Action without Performance on the Part of the Insured, unless Performance is Excused through the Fault of the Insurer.⁷⁹

In *Morley v. Liverpool & London & Globe Ins. Co.*,⁸⁰ outside of the question of fraud presented, the contention referred chiefly to the legal effect of certain acts performed, both by the plaintiff or his assignor and the defendant, in respect to the ascertainment of the loss claimed by arbitration. There were several companies in-

⁷⁸ Page 94.

⁷⁹ *Eichner v. Insurance Co. (Com. Pl.)* 9 N. Y. Supp. 954; *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5, 8 S. W. 630; *Old Saucelito Land & Dry-Dock Co. v. Commercial Union Assur. Co.*, 66 Cal. 253, 5 Pac. 232, and 14 Ins. Law J. 135; *Gauche v. Insurance Co.*, 10 Fed. 347, 11 Ins. Law J. 361; *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. 561, and 17 Ins. Law J. 714; *Chipewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055, and 19 Ins. Law J. 535; *Pioneer Manuf'g Co. v. Phoenix Assur. Co.*, 106 N. C. 28, 10 S. E. 1057, and 19 Ins. Law J. 408; *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252, and 19 Ins. Law J. 243; *Hanover Fire Ins. Co. v. Lewis*, 10 South. 297, 28 Fla. 209, and 21 Ins. Law J. 316.

⁸⁰ 85 Mich. 210, 48 N. W. 502.

terested in the controversy, all of whom, by their adjusters and attorneys, were acting in substantial accord. The policy of the defendant in this suit provided in a proper form of words that, when differences should arise between the insured and the company in regard to loss or damage, at the written request of either party the matter should be submitted to arbitrators; and the company was given the right to take the property, or any part thereof, at the valuation fixed by the arbitrators.

The policies were all issued to one Lenhoff, the owner of a stock of merchandise at East Saginaw, Mich. After the fire they were assigned to plaintiff. A part of the stock had been burned, but a much larger part had been saved in a damaged condition. Lenhoff and the adjusters failing to agree in regard to the damage sustained, on March 8th a submission to arbitration was executed, which provided that the arbitrators should not take into account or consider the question of merchandise totally consumed. The arbitrators entered at once upon the performance of their duties, and soon after returned an award of \$4,858.11. Immediately, or within a few days, Lenhoff, in writing, revoked the arbitration. He said: "I have elected and do hereby elect to cancel, annul, and revoke the same, and I decline to proceed with or be bound thereby." No reasons for this act were given at the time, but later, upon the trial of the case, it was urged by counsel, in justification of this revocation, that the whole question of loss and damage had not been embraced in the submission; the arbitrators being only required to consider the damage sustained to the stock saved.

A few days subsequent to receiving the notice of revocation, defendant notified Lenhoff that he was required to submit to the sworn examination provided for by the terms of the policy. This demand was promptly complied with, and afterwards, something more than two months intervening, Lenhoff wrote defendant: "For the purpose of arriving at a speedy settlement of my claim, I hereby offer to submit the question of my loss and damage under your policy to arbitration, and I request that said arbitration be entered into, pursuant to the terms and conditions of said policy." This request was declined by defendant without assigning any specific reasons, except that the claim had passed into the hands of a trustee.

Grant, J., delivered the opinion of the court, from which we quote as follows: "The plaintiff and defendant, by this agreement to arbitrate the damage to the goods which could be identified, had waived any other arbitration and award provided for by the policy. By his revocation, the plaintiff violated his agreement, and lost his right to sue upon the policy, which could only be regained by a seasonable offer to submit the amount of damage to arbitration. His offer of August 6th came too late. He had disposed of the goods. He had deprived the defendant of the valuable right provided by the policy, to take them at the appraisal. The silence of the defendant's adjuster did not constitute an acquiescence in the revocation. After that defendant was not called upon to speak or act until some affirmative action was taken by plaintiff. This is clearly within the principle of *Chippewa Lumber Co. v. Phenix Ins. Co.*⁸¹ But, more than two months after its revocation, defendant demanded of plaintiff that he submit to an examination under oath. * * * By so doing, defendant subjected * * * plaintiff to additional costs and expense. This conduct was entirely inconsistent with the idea that the defendant insisted upon the forfeiture. This is directly within the rule in *Marthinson v. North British & Mercantile Ins. Co.*,⁸² and *Titus v. Glens Falls Ins. Co.*, *supra*."

The principal question here considered by the court we do not find has ever before been passed upon in any insurance case, and the correctness of the conclusion reached, we think, cannot be well questioned. There is, however, in the opinion of Justice Grant, an intimation that Lenhoff would have been entitled to another arbitration had he made a timely request. He says: "By his revocation, the plaintiff violated his agreement, and lost his right to sue upon the policy, which could only be regained by a seasonable offer to submit the amount of damage to arbitration." This language, we think, is liable to be misunderstood, as we cannot suppose that so able a court intended to say what the words fairly imply. The regularity of the proceedings which resulted in the award had not been questioned, but, the award not being satisfactory to Lenhoff, without offering any reason for doing so he gave

⁸¹ 80 Mich. 116, 44 N. W. 1055.

⁸² 64 Mich. 372-378, 31 N. W. 291; 81 N. Y. 410-418.

notice of his repudiation of the action taken, and that he would not be bound by the decision of the arbitrators. We think there can be no doubt that this award was final, *res adjudicata*, unless it was shown that the revocation of Lenhoff was acquiesced in by the defendant, which the court denies. The claimant could undoubtedly repudiate the award, but, in doing so, in legal effect he voluntarily abandoned his right to recover on the policy. If his refusal to accept the award, without showing any reason why it was bad, would entitle him, on seasonable demand, to another arbitration, he could do the same thing again and again, taxing the defendant with expenses, and wearying his patience, until the claimant had become tired of his own contumacy, or had secured an award favorable to his interests. Proceedings under a submission to arbitration are quasi judicial, and when their legality, as in this case, is undisputed, they will bind the parties as firmly as will the judgment of a court.⁸³

§ 277. Who may Appraise.

All persons competent to make contracts may, for themselves, submit any matter to arbitration; but when acting for others, under general powers, they will not ordinarily have authority to bind those for whom they act in matters of this kind.⁸⁴ One hav-

⁸³ When there is no fraud or misconduct, an award is conclusive and final, and any mere mistake of the arbitrators in either judgment or skill will not be sufficient to set it aside. *Liverpool & London & Globe Ins. Co. v. Goehring*, 99 Pa. St. 13, 11 Ins. Law J. 91; *Indiana Ins. Co. v. Brehm*, 88 Ins. 578, 12 Ins. Law J. 607.

The conclusiveness of an award does not depend upon its acceptance by the parties to the submission, nor is it rendered invalid by a failure to pay or tender the amount awarded. *Hanover Fire Ins. Co. v. Lewis*, 10 South. 297, 28 Fla. 209, and 21 Ins. Law J. 316.

"A valid award has same effect as a judgment, and concludes the parties to the controversy effectually from litigating the same matters anew." 1 Am. & Eng. Enc. Law, 711.

⁸⁴ The agent, trustee, or attorney will usually have no power to submit questions to appraisal or arbitration unless their delegated powers are so large as to give them full control of the subject-matter. They must be acting with practically unrestricted authority in reference to the subject of submission, and able to perform the award. An adjusting officer, having

ing authority to demand the payment of debts, and even to sue for the same, would not be authorized to enter into a submission for arbitration to determine the amount due, or any other question in dispute concerning the special or general duties he is empowered to perform in relation to such debts; and partners who have authority to sign for the firm in the ordinary business transactions in which it is engaged will not generally be presumed to have the power to bind their co-partners in an act which has the effect of substituting a special tribunal for the settlement of differences, in place of those created by law.⁸⁵ If, however, the partners not signing the submission are present, or, if not present, assent to the proceedings, they will be bound. When one signs a submission to arbitrate for another, without authority to do so, he will be personally bound for the performance of the award.⁸⁶

Morse on Arbitration⁸⁷ says: "If an agent enters into the submission in his own name, or if he merely describes himself and signs the submission as 'A, Agent,' he will be personally bound to perform the award."

authority in respect to the settlement of loss claims, may sign a submission for an appraisal; but it would be otherwise with the local agent, unless acting under special instructions. 1 Am. & Eng. Enc. Law, 648; Bean v. Farnam, 6 Pick. (Mass.) 269; Brady v. Mayor, etc., of Brooklyn, 1 Barb. (N. Y.) 584; Wyatt v. Benson, 23 Barb. (N. Y.) 327; Morse, Arb. 4.

⁸⁵ "All partners must be parties to the arbitration." 1 Am. & Eng. Enc. Law, 651; Jones v. Bailey, 5 Cal. 345; Wood v. Shepherd, 2 Pat. & H. (Va.) 442; Backus v. Coyne, 35 Mich. 5; Eastman v. Burleigh, 2 N. H. 484; St. Martin v. Thrasher, 40 Vt. 460; Karthaus v. Ferrer, 1 Pet. 222; Davis v. Berger, 54 Mich. 652, 20 N. W. 629; Buchanan v. Curry, 19 Johns. (N. Y.) 137; Harrington v. Higham, 13 Barb. (N. Y.) 660; Hutchins v. Johnson, 12 Conn. 376.

There is a departure in several of the states from the rule supported by the cases above cited. In Kentucky, Ohio, Illinois, and Pennsylvania, and possibly one or two other states, a partnership will be bound by a submission to appraisal or arbitration if signed by one of the co-partners. Hallack v. March, 25 Ill. 48; Gay v. Waltman, 89 Pa. St. 453; Southard v. Steele, 3 T. B. Mon. (Ky.) 435; Wilcox v. Singletary, Wright (Ohio) 420.

⁸⁶ McBride v. Hagan, 1 Wend. (N. Y.) 326; Jones v. Bailey, 5 Cal. 345; Brink v. Insurance Co., 5 Rob. (N. Y.) 104; Dater v. Wellington, 1 Hill (N. Y.) 319; Buchanan v. Curry, 19 Johns. (N. Y.) 137; Wood v. Shepherd, 2 Pat. & H. (Va.) 442; Armstrong v. Robinson, 5 Gill & J. (Md.) 412.

⁸⁷ Page 14.

In England the doctrine of holding the agent personally liable has been carried very far. Russell says: "In general, a man is bound by an award which he enters into for another."

An attorney at law, after suit has been brought, will have authority to refer the cause of his client; but it is a matter of extreme doubt whether he would have such authority before suit was commenced, although he had been retained in the expectation that the matter would be taken into court.⁸⁸

As a public officer cannot delegate his powers, he cannot become a party to arbitration. This incapacity is general, and refers without distinction to all officers of the government, from the chief executive to school district director.⁸⁹

So, too, where property is owned jointly, as by the heirs of an undivided estate, no one of the several persons interested can submit to arbitration any question involving a joint or community right. While, as in the case of partners, it may not be necessary for each interested person to separately sign the submission, no one's rights can be concluded by the award who has not in some distinct form given assent to the proceedings.⁹⁰

§ 278. Submission to Arbitrate or Appraise Subject to Same Rules of Construction as Other Contracts.

When a submission is in writing, it will be subject to the same rules of construction as ordinary contracts. Its terms cannot be shown by parol evidence; and if the writing expresses clearly the intention of the parties in respect to the subject-matter included, leaving nothing to construe, the arbitrators must confine themselves to a consideration of such matters. To include other things not within the scope of the submission, or to omit the considera-

⁸⁸ Attorneys at law, acting out of court, cannot bind their clients by oral agreements to arbitrate. *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692.

What cannot be done by parol in this relation cannot be done by formal written submission.

⁸⁹ *U. S. v. Ames*, 1 Woodb. & M. 76, Fed. Cas. No. 14,441; *Mann v. Richardson*, 66 Ill. 481.

⁹⁰ *Boyd v. Magruder*, 2 Rob. (Va.) 761; *Eastman v. Burleigh*, 2 N. H. 485; *Smith v. Smith*, 4 Rand. (Va.) 95.

tion of matters referred, would make the award bad. The submission, after being entered into, may, however, like other contracts, be changed either by parol or in writing.

§ 279. Arbitrators, How Chosen.

If the submission be that the matter shall be left to the determination of experts or builders or engineers, and the selection of the third person or umpire is made by the two arbitrators first chosen, unless such third person be an expert, as provided in the submission, the award will not be sustained. While the parties themselves could agree upon an umpire who was not possessed of special knowledge, it would be otherwise with the arbitrators appointed. They have no powers except those conferred by the submission, and in their action under it there must be no substantial departure from its terms. If, in the submission, it is designated that the question of loss or damage shall be determined by three brick masons, and that the award of any two shall be binding and conclusive, the two arbitrators first chosen being authorized to choose an umpire, and a carpenter is thus selected instead of a brick mason, the award signed only by one of the persons first selected and the umpire would be bad, unless the parties to the arbitration assented to the selection of the carpenter as umpire. If, however, in such case, the award was signed by all of the arbitrators, or even by the two appointed by the parties interested, it would, we think, be upheld.

§ 280. Arbitrators First Selected cannot Choose an Umpire by Lot.

In *Hart v. Kennedy*,⁹¹ the two arbitrators first chosen were empowered to choose an umpire in case they failed to agree between themselves in respect to the matters submitted for their consideration. The necessity for an umpire arose, and, differing for a long time as to what person should be selected, they finally agreed to have the choice determined by lot, which was done. We quote from the opinion of the court: "The two, in choosing the third,

⁹¹ 47 N. J. Eq. 51, 20 Atl. 29.

performed, in the language of Justice Coleridge, a judicial act of the last importance to the parties, in the performance of which the parties had a right to the exercise of their joint judgment up to its entire completion.⁹² Knowledge is indispensably necessary to judgment. It was not possible for either of the two to form such a judgment respecting the fitness of the person proposed for the third as the parties were entitled to, unless he had either previously personally known the person proposed, or known of him for a sufficient length of time to become acquainted with his professional qualifications or standing. If he did not either know the person proposed, or know of him, he would necessarily be totally unable, in consequence of his ignorance, to form a judgment respecting his qualifications. As to one of the two arbitrators, it stands, for the purposes of the present motion, as an admitted fact that he consented to the selection of the third, by casting lots, without sufficient knowledge of his professional acquirements or standing to be able to judge whether he would be a fit appointee or not. The answer and cross bill, it will be remembered, both distinctly aver that each of the two arbitrators refused to agree or to accept the person proposed by the other as the third, because the nominee of the other was not only unknown to him, but also because he did not know that such nominee possessed the qualifications required by the arbitration agreement. For present purposes, therefore, it must be taken as an admitted fact that the third arbitrator was selected without the least exercise of judgment by one of the two as to the qualifications of the third, and that, as to him, the selection of the third was entirely the result of chance, and not the result of his judgment.

“Now, although it is true that the cases involving the same question which is presented here have not all been decided according to precisely the same legal principle, yet I think it may safely be affirmed that no case can be found which declares that the appointment of an umpire or third arbitrator, made in the manner in which it is confessed that the third was chosen in this case, is valid. The earliest case on this subject which has come under my notice is *Harris v. Mitchell*.⁹³ The submission here provided that, if the two persons selected as arbitrators did not make an

⁹² Lord v. Lord, 5 El. & Bl. 404-407.

⁹³ 2 Vern. 485 (1704).

award within a certain time, the two were then to choose an umpire, whose award should be final. No award was made within the time limited. The two then each named a person for umpire, but, failing to agree upon either of the persons named, they agreed to throw 'cross and pile' as to which should have the naming of the umpire, or whose man should stand; and the umpire was chosen in this way. The parties, on the umpire's summons, afterwards attended before him, and he subsequently made his award. On the bill to set the award aside, the master of the rolls held that an election or choice of an umpire is an act that depends on the will and understanding; and that as the two arbitrators had followed neither in the selection of the umpire, but had committed his selection to chance, the award should be set aside. The next case in order of time is *Neale v. Ledger*.⁹⁴ In this case it was held (Lord Ellenborough pronouncing the judgment of the court) that where two arbitrators "toss up" to decide which of them shall nominate the third, in exclusion of the other, and the third is selected in that way, the appointment is bad. But it was also held that where each of the two nominate a person for the third, who, in the judgment of the other, is nearly as fit as his own nominee, and the two then select, by lot, one of the two, whom both approve as fit, the appointment is good. Lord Ellenborough concluded his judgment in this case by remarking: 'The mode of appointing twelve jurors out of all those who are returned as fit to serve is by lot.' In *Wells v. Cooke*,⁹⁵ the award was set aside because the umpire was chosen by drawing lots.

"In 1829, the court of king's bench, after an examination of all the prior adjudications with very careful consideration, said, speaking by Lord Tenterden: 'The parties to the reference expect the concurring judgment of the two in the appointment of a third; and we think it better not to decide the present case upon any nice ground of resemblance to or difference from the other [cases], which might lead to discussion and litigation in other cases, but to lay it down as a general rule that the appointment of the third person must be the act of the will and judgment of the two,—must be the matter of choice, and not of chance, unless the parties con-

⁹⁴ 16 East, 51 (1812).

⁹⁵ 2 Barn. & Ald. 218.

sent to or acquiesce in some other mode.⁹⁶ The rule thus laid down, though a departure from the principle established by *Neale v. Ledger*, will be found to have been adhered to (not, however, without the expression of doubt) from 1829 to 1867, as an examination of the cases will show.⁹⁷ But in 1867 the court of queen's bench reaffirmed the principle laid down in *Neale v. Ledger*, *supra*. In the case then before the court, it appeared that the arbitrators, not being able to agree in the appointment of an umpire, cast lots as to which of the two persons proposed should be appointed; but, before they cast lots, they each agreed that the person proposed by the other was a fit and proper person to be umpire, and to discharge the duties which would be thrown upon him. It thus appeared that the parties had had the benefit of the judgment of the two as to the fitness of the person selected by them as a third. Cockburn, J., said: 'Where there is a concurrent judgment, expressed by the arbitrators, that the person eventually appointed is a fit person, there is no reason why, because they have determined by lot between A. and B., each equally fit, the award should be set aside.'⁹⁸ This is the principle now in force in England. Its wisdom and justice are obvious. It secures to the parties the full benefit of the concurrent judgment of the two persons to whom they have committed the selection of the third, as to his fitness, and at the same time prevents the defeated party from defeating the object of the arbitration, and overthrowing the award on a ground which does not touch the merits of the controversy, but is purely technical in its character.

"But it is insisted that the court should presume, in the absence of all knowledge of what the truth is, that the defendant consented that the third arbitrator should be selected by chance. Should such a presumption be made, the action of the court would, in my opinion, be much less excusable, and much more indefensible, than that of the two arbitrators. There can be no consent without knowledge. Consent given in ignorance of any material fact is

⁹⁶ *In re Cassell*, 9 Barn. & C. 624.

⁹⁷ *Ford v. Jones*, 3 Barn. & Adol. 248; *In re Tunno*, 5 Barn. & Adol. 488; *In re Jamieson*, 4 Adol. & E. 945; *In re Greenwood*, 9 Adol. & E. 699; *European & American Steam Shipping Co. v. Crosskey*, 8 C. B. (N. S.) 397.

⁹⁸ *In re Hopper*, L. R. 2 Q. B. 367-376.

no consent.⁹⁹ In the case last cited, Lord Denman said: "The presumption, at all events, is against the election of an umpire by lot. Such a transaction should, at least, be fully explained. It should appear that each arbitrator exercised his judgment on the fitness of the person to be balloted for, and that the parties knew of the course about to be adopted." * * * Arbitrations are to be conducted upon the ordinary principles upon which other judicial inquiries are conducted."

§ 281. Parties have a Right to be Heard and Present Proofs.

The parties have a right to be heard by their proofs. Their right, in this respect, is a primary right. It is founded in natural justice. "The principle," said Chief Justice Spencer, in *Van Cortlandt v. Underhill*,¹⁰⁰ "is so fundamentally just that it requires no adjudged cases to support it." He also said that a denial of it constituted gross and scandalous misbehavior. The doctrine that the parties to an arbitration have a right to be heard by their proofs is an established principle of the jurisprudence of this state. The court of errors and appeals, and also this court, adopted this principle as the rule of its judgment in *West Jersey R. Co. v. Thomas*.¹⁰¹ The parties in that case agreed to submit the matters in difference between them to the award of two arbitrators, with power, in case the two could not agree, to select a third. The two, being unable to agree, selected the third; and then the three, without notice to the parties, and without affording them an opportunity of being further heard, proceeded secretly to make up their award. In a suit to set aside the award, both courts declared that, after the third arbitrator was chosen, the parties had a right to adduce additional testimony and additional argument; and that, unless such right was either clearly waived by the agreement or by the conduct of the parties, notice of the appointment of the third arbitrator, and an opportunity to be heard before him, by both proof

⁹⁹ In re Jamieson, 4 Adol. & E. 945; In re Greenwood, 9 Adol. & E. 699.

¹⁰⁰ 17 Johns. (N. Y.) 405-411.

¹⁰¹ 21 N. J. Eq. 205, 23 N. J. Eq. 431, and 24 N. J. Eq. 567.

and argument, were essential preliminaries to a valid award. The award was set aside, on the ground that the arbitrators, in failing to give the parties an opportunity to be heard, by proof and argument, before the third arbitrator, had violated a principle of law founded in natural justice.¹⁰²

§ 282. Distinction between Arbitration and Appraisement.

It should be kept in mind that there is a very substantial difference between "arbitration," under the terms of an insurance contract, and an "appraisement," although both modes of reaching a settlement of the loss may frequently be found equally efficacious. When the submission is to appraise damages, the property, or at least some part of it, still being in existence, the duty of the appraisers will not often require them to consider argument or hear evidence, as inspection of the property which has sustained injury will ordinarily aid their judgment in reaching an intelligent and satisfactory conclusion. Proceedings, therefore, under a submission to appraise, will generally be less formal, and may be conducted in the absence of the parties, and without hearing testimony as to the value of the property or as to the extent to which it has sustained damage.¹⁰³

¹⁰² "The arbitrator or appraiser should have all the evidence material to the question which the parties choose to lay before him." 1 Am. & Eng. Enc. Law. 680.

He is, however, in this country, not bound by the strict rules of law, and when appointed as an expert, with the understanding that he will be governed largely by the special and technical knowledge which he has in reference to the subject in controversy, may disregard evidence offered by the parties to the arbitration. *De Groot v. Insurance Co.*, 4 Rob. (N. Y.) 504; *Hall v. Insurance Co.*, 57 Conn. 105, 17 Atl. 356, and 18 Ins. Law J. 518.

Arbitrators may confer with specialists, accountants, builders, artisans, and other persons having special qualifications to impart needed information. In the formation of their conclusions, they may be guided by the professional opinions, experience, and expert knowledge of others. *Russ. Arb.* 214; *Emery v. Wase*, 5 Ves. 846; *Lingood v. Eade*, 2 Atk. 501; *Hopcraft v. Hickman*, 2 Sim. & St. 130; *Moore v. Barnett*, 17 Ind. 349; *Galloway's Heirs v. Webb, Hardin (Ky.)* 318.

¹⁰³ *James v. Schroeder*, 61 Mich. 28, 27 N. W. 850.

§ 283. Parties must have Notice of Where and When the Appraisers Meet, and have Opportunity to be Heard.

But, when the submission is to arbitrate, the parties must have notice of the time and place when and where the arbitrators will meet to consider the question in dispute. To this rule the courts have recognized important exceptions, to which we have called attention in the earlier part of this chapter, as where the arbitrators were selected with reference to their special skill in respect to the matter, with the understanding between the parties that the award was to be based upon their special knowledge and judgment. In such cases it has been held that it is immaterial whether the parties have notice of the meetings of the arbitrators or not, and that, if they even refuse to hear evidence, it will not invalidate the award.

This question was before the supreme court of Illinois in *Vessel Owners Towing Co. v. Taylor*.¹⁰⁴ Magruder, J., said: "In England the practice has been for the party wishing to go on with the reference to call upon the arbitrator, deliver to him the submission, and request him to appoint a meeting. The arbitrator gives to the party so applying a written appointment, specifying the time and place for the parties and their witnesses to appear, a copy of which appointment the party so receiving it serves upon his opponent. In the United States the duty of giving notice of the time and place of hearing seems to belong to the arbitrators. They have it in charge to see that sufficient notification is made to each party.¹⁰⁵ Unless it was the intention of the parties that the arbitration should proceed without their presence, the arbitrators must give both parties notice of the time and place of meeting, and they have no authority to proceed *ex parte*.¹⁰⁶ In *Wood v. Helme*,¹⁰⁷ where the submission was silent as to notice, the court said: "Without question it was the duty of the arbitrators, under the submission in this case, to give due notice to the parties of the time and place for hearing the cause, before proceeding therein.

¹⁰⁴ 126 Ill. 250, 18 N. E. 663.

¹⁰⁵ Morse, Arb. 117, 118, and cases there cited; Russ. Arb. (6th Ed.) 76.

¹⁰⁶ 6 Wait, Act. & Def. 522.

¹⁰⁷ 14 R. I. 325.

In *Ingraham v. Whitmore*,¹⁰⁸ we said: 'The doctrine is well established that where an arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made any notice of the proceedings under the submission, the award is void.' We are therefore of the opinion that it was the duty of the arbitrators in this case to see to it that all the parties to the submission had notice of the time and place of their meeting. * * * In *Wood v. Helme*, *supra*, it appeared that, during the examination and hearing, one of the arbitrators absented himself, and it was held that such absence invalidated the award, on the ground that the arbitrators did not act together. Each party is not only entitled to be present when the witnesses or arguments are heard, but each is entitled to have his case submitted to all the arbitrators.¹⁰⁹ In *Smith v. Smith*,¹¹⁰ we said: 'It is a rule that all the arbitrators must act, and act together. They must each be present at every meeting, and the witnesses and the parties must be examined in the presence of them all.'

§ 284. Who are Qualified as Arbitrators or Appraisers.

Any person will be competent to act as an arbitrator who is of lawful age, sound mind, and not interested in the results of the controversy, unless such person has formed an opinion in the matter. If there is any relationship between the arbitrators and either of the parties, he will be presumed to be interested to such an extent as to wholly disqualify him to act. When a person is appointed as appraiser or arbitrator, between whom and either of the

¹⁰⁸ 75 Ill. 24.

¹⁰⁹ *Morse*, Arb. 117-152.

¹¹⁰ 28 Ill. 56; 1 Am. & Eng. Enc. Law, 683; 2 Russ. Arb. 222.

Among the authorities in both England and America, there is no dissent to the proposition that arbitrators must act together. Both inquiry and deliberation should proceed from the concerted will and wisdom of the entire board. With the division of effort comes a more accentuated partisan feeling, which tends to lead from instead of towards the truth. *Blin v. Hay*, 2 Tyler (Vt.) 304; *Hills v. Insurance Co.*, 129 Mass. 345; *Carpenter v. Wood*, 1 Metc. (Mass.) 409; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Smith v. Smith*, 28 Ill. 56; *Bannister v. Read*, 6 Ill. 92; *Baker v. Farmbrough*, 43 Ind. 240; *Harris v. Norton*, 7 Wend. (N. Y.) 534; *Cope v. Gilbert*, 4 Denio (N. Y.) 347.

parties a relationship exists, and the fact is known and the consideration of the matter is allowed to proceed without objection, the award will be good; but it will be otherwise if the relationship is not disclosed until after the award has been made.¹¹¹

§ 285. When a Stockholder may Act as Arbitrator in a Matter in Which the Corporation is Interested.

A stockholder in a corporation will not ordinarily be held incompetent to act as arbitrator in a case where the corporation is a party. If it appears, however, that his interests as share owner are sufficiently important to influence his judgment, the case will be otherwise. And the same is true in regard to a creditor. If the debt due him from one of the parties is small, or its payment secured, there will be no presumptions of interest to create a disqualification. It is well settled that persons who have formed opinions as to the subject of reference are incompetent. If it can be shown that the mind of the arbitrator or referee has been affected with any positive bias, or that he was in any manner committed to any particular result, the award will be set aside.

§ 286. A Person Who has Formed an Opinion is Disqualified to Serve as Arbitrator.

In *Conrad v. Massasoit Ins. Co.*,¹¹² the insurer, after the fire, had an estimate made, and, subsequently failing to agree with the insured as to the amount of loss, proposed as arbitrator the same person whom he had procured to make the estimate. The insured's acceptance being without knowledge on his part that the arbitrator proposed had already computed the damage, the award was not sustained.

Morse on Arbitration¹¹³ says: "Whether or not the existence of prepossession or prejudice in the mind of the arbitrator, if wholly unknown to both parties, or if known only to him against whom it would operate (if this latter case be conceivable), would avoid

¹¹¹ *Brown v. Leavitt*, 26 Me. 251; Morse, Arb. 110.

¹¹² 4 Allen, 20.

¹¹³ Page 101.

the award, is a very different question, not determined by any adjudicated case so far as I can discover."

§ 287. The Award will be Upheld if Arbitrators were Known to have Formed Opinions at the Time of Their Appointment.

When, however, the parties have knowledge, when signing the submission, that one or all of the arbitrators appointed have preconceived opinions, and are not without prejudice, they will be estopped from afterwards pleading such bias in avoidance of the award. In *Strong v. Strong*,¹¹⁴ Cushing, J., said: "If, indeed, parties in controversy choose to waive the right of impartial trial, and purposely and avowedly select as arbitrators persons having formed opinions on the subject-matter, or known to have partialities for and against the respective parties, the court, without commending, will not set aside the award, merely because of the character of the arbitrators."

And to the same purpose was the declaration of Chief Justice Shaw, in *Fox v. Hazelton*.¹¹⁵ He said: "*Volentia non fit injuria*. If parties are content to submit questions in controversy to those who are known to have formed and expressed opinions on the subject-matter, or who are known to have partialities or prejudices for or against the respective parties, an award made by such arbitrators is binding. If the objection is known to the party before the hearing, and no exception taken, the objection must be taken to be waived, and the consent of the parties be presumed that the hearing shall proceed."

§ 288. Arbitrators may Select Time and Place of Meeting.

Unless the submission otherwise provides, the arbitrators may, in their discretion, designate the time and place of meeting. It will, of course, be their duty to give both parties reasonable notice of the appointment made. The meeting should be at an accessible place and at a reasonable hour, unless a different place or time is assented to by the parties interested.

¹¹⁴ 9 Cush. (Mass.) 560.

¹¹⁵ 10 Pick. (Mass.) 275.

In *Bray v. English*,¹¹⁶ it was held: "If no provision is made to the contrary, it is incidental to the power of referees or arbitrators to appoint the time and place of trial, and to proceed therein according to their discretion."

§ 289. Parties must have Notice of Time and Place of Meeting of Arbitrators.

It is indispensable that both parties should have timely notice of all meetings to be held by the arbitrators for the hearing of evidence and argument, but of meetings appointed for conference and deliberation on the part of the arbitrators the parties need not be notified, as such meetings are in a sense private and confidential. When meetings for this purpose only are held, the presence of the parties would manifestly be improper, as the arbitrators would often be thereby embarrassed in their consultations, and deprived of the fullest liberty in their expression of views and interchange of opinion. Written notice is not necessary, unless the submission so provides. It is only important that each of the parties should have definite and authoritative information of when and where the arbitrators will meet to receive evidence or hear argument. While an arbitrator has considerable discretion as to the amount of evidence he will hear, it will not generally be proper for him to decline to receive proofs in respect to material matters.

Morse on Arbitration¹¹⁷ says: "Even where the subject-matter in dispute is such that the arbitrator thinks he can judge conclusively about it by simply taking a view, as where the action is for repairing a house or for not building a certain vehicle according to a certain contract, he must yet hear each party, if desired so to do. His award made simply on his own inspection will be bad; at least, if either party wished to be heard and to introduce testimony. There are cases which would go far to sustain the broad general rule that if arbitrators refuse to hear testimony which is offered, and is in fact pertinent and material to the controversy, going to prove a point which needs to be proved and properly admissible, the error may be cause for vacating the award or report.

¹¹⁶ 1 Conn. 498.

¹¹⁷ Page 143.

* * * But if the submission be to an expert, as such, the rule may be different. Thus, if a person is selected as an arbitrator by reason of some special knowledge or skill possessed by him with reference to the matter in controversy, so that it is apparent that the parties intended to rely upon his personal information, investigation, and judgment, it may be that he will be justified in refusing altogether to hear evidence. Thus, where it was referred to surveyors to settle the amount of rent and the other terms of the lease of a coal mine, and no witnesses were examined,¹¹⁸ Lord Chancellor Cranworth said: 'I do not agree in the suggestion that it was incumbent upon the arbitrators to examine witnesses. I do not think that is the meaning when a matter is referred to surveyors and people of skill to settle what the value of the property to be bought or let is. Necessarily, they are intrusted, from their experience and their observation, to form a judgment which the parties referring to them agree shall be satisfactory. Therefore I do not think there was anything of importance in their not examining witnesses, provided bona fide they meant to say, "We know sufficient of the subject to decide properly, without examining witnesses."'"

Morse, in further support of the general proposition, refers to *Johnston v. Cheape*,¹¹⁹ where the arbitrators refused to consider a statement of facts presented by one of the parties, which it was offered to support by proofs. He was held to have acted justifiably, provided that, with the knowledge he had upon the subject, he felt satisfied that the proof of these facts, even if satisfactorily made, could not affect his decision.

§ 290. Arbitrators must Act Together.

All the arbitrators named in the submission must act together in considering the matter in controversy. They are all to be regarded as members of one body, and cannot separately hear the evidence and arguments of parties. We quote from Morse again:¹²⁰ "It is an imperative rule that, where the submission is to several arbitrators jointly, all must act together during the proceedings. English and American authorities are alike agreed upon this. All

¹¹⁸ *Eads v. Williams*, 24 Law J. Ch. 531. ¹¹⁹ 5 Dow. 247. ¹²⁰ Page 151.

must be present throughout each and every meeting equally, whether the meeting be for hearing the evidence or arguments of the parties, or for consultation or determination upon the award. The disputants are entitled to the exercise of the judgment and discretion, and to the benefit of the views, argument, and influence, of each one of the persons whom they have chosen to judge between them, and they are entitled to these, not only in the award, but at every stage of the arbitration."

In support of this statement of the law, Mr. Morse cites a large number of both English and American cases.

Where the arbitrators consider the facts and hear the evidence apart, although they come together afterwards and agree upon an award, their action will not be sustained by the courts. The rule is not changed when the submission provides that an award of a majority shall be binding and conclusive. The award may be made by a part, but the investigation and consideration of the matter must be the work of all, not acting individually, but as one body. The reason is aptly stated by Mr. Morse, as follows: "The parties have stipulated for the benefit of the thought and consideration of each of the arbitrators, and for the influence of each upon the rest, and that which the parties have stipulated for they must have, if the award is to be upheld."

§ 291. When One of the Three Arbitrators Withdraws during the Investigations, the Other Two may Proceed, and Their Award will be Good.

When, however, the arbitrators have proceeded to act under the submission, and one of the number withdraws, the others may complete their investigations, and return an award, by proceeding in the same manner as would have been proper had there been no withdrawal. When one of the arbitrators has distinctly stated his purpose not to act further in considering the case, it is unnecessary to notify him of the subsequent meetings.¹²¹ The principle that the withdrawal of one arbitrator cannot defeat the award will, of course, apply only where the submission provides that an award

¹²¹ Maynard v. Frederick, 7 Cush. (Mass.) 247; Carpenter v. Wood, 1 Metc. (Mass.) 409.

of the majority will be binding. When one of the arbitrators dissents to the expressed opinions of the other two, but does not distinctly withdraw from a further consideration of the case, an award agreed upon by the two without other conference or consultation with the third will not be good. Should it occur when three persons are appointed to arbitrate, with authority conferred upon either two to bind the parties by an award, and before any evidence has been heard or any action taken to investigate the matter, that one of the three absolutely declines to act, it is doubtful whether the remaining two may proceed with the inquiry and make a valid award.

§ 292. When Arbitrators cannot Refuse to Hear Evidence.

In *Canfield v. Watertown Fire Ins. Co.*¹²² the controversy related to the validity of an award. While arbitration had not been provided for in such a manner, by the terms of the policy, as to make an award a condition precedent to a right of action, the parties had entered into a submission, and the arbitrators chosen returned an award, which the plaintiff refused to accept; for the reason, as was alleged, that the arbitrators declined to receive evidence in regard to certain items of loss, and that they had wrongfully excluded from their consideration of the damages he had sustained, under the policy, valuable property that had suffered injury by the fire. *LYON, J.*, said: "Whether it be a statutory or a common-law arbitration, the exclusion of proper testimony is fatal to the award. In *Van Cortland v. Underhill*,¹²³ decided by the court, for the correction of errors, Chief Justice Spencer said: 'If the arbitrators refuse to hear evidence pertinent and material to the matter in controversy, it is unquestionably such misconduct as will vitiate an award in a court of chancery.' We have already held that the aggrieved party may also be heard to assert the invalidity of the award for such cause in a court of law. The same result would necessarily follow the exclusion of such evidence through the fraud of the opposite party. We do not intend to say that it is not competent for parties to an arbitration to frame the submis-

¹²² 55 Wis. 419, 13 N. W. 252, and 12 Ins. Law J. 111.

¹²³ 17 Johns. (N. Y.) 405.

sion so that the arbitrators may decide the controversy upon their own judgment and observation, without resort to evidence aliunde, but here we have no such submission."

There has been a good deal of discussion, and important differences of opinion exist, in regard to when it is indispensable that notice of the time and place of the meeting of the arbitrators shall be given the parties to the submission, and when the omission of such notice may be excused. From a very full and careful analysis of the authorities, we reach the conclusion that when the proceedings under a submission attain to the dignity and character of an arbitration, when matters are finally determined by the award concerning which the parties have actually differed, they will not be bound, unless they had notice of the time and place when and where the arbitrators would meet, and an opportunity was given to produce evidence and offer argument.¹²⁴

It is certainly a reasonable proposition, and we think a legal one, that notice shall be given of the meeting of the arbitrators by whom the rights of the parties are to be finally determined, when the proceedings had are in the form of an inquiry, and when material facts are to be developed and considered, the value and character of which there are no reasons for presuming the appraisers will be better qualified to judge of than other persons. When the conclusions of the appraisers or arbitrators bind the parties to the submission as firmly as a decree of the court, and the investigations they are to make are of a judicial character, we think the parties are entitled to be heard, and must have notice of the time and place when and where the investigations will be made and the deliberations of the arbitrators had.

Justice Dickey, in his dissenting opinion in the case of Norton

¹²⁴ The following authorities appear to be in support of this statement of the law: *Peters v. Newkirk*, 6 Cow. (N. Y.) 106; *Bushey v. Culler*, 26 Md. 534; *Thornton v. Chapman*, 2 Cranch, C. C. 244, Fed. Cas. No. 13,997; *Hartford Bridge Co. v. Granger*, 4 Conn. 143; *Ingraham v. Whitmore*, 75 Ill. 25; *Falconer v. Montgomery*, 4 Dall. 222; *Wilson v. Boor*, 40 Md. 483; *Hubbard v. Hubbard*, 61 Ill. 228; *Moran v. Bogert*, 16 Abb. Prac. (N. S.) 303; *Billings v. Billings*, 110 Mass. 225; *Thomas v. Railroad Co.*, 24 N. J. Eq. 567; *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628; *McMahon v. Railroad Co.*, 20 N. Y. 463; *Eads v. Williams*, 31 Eng. Law & Eq. 203.

v. Gale,¹²⁵ after referring to McAuley v. Carter and Korf v. Lull,¹²⁶ said: "In these decisions I fully concur. They do not invade the fundamental principles of common fairness and justice, which pervade the law in all civilized communities, and which demand that in all proceedings, judicial and quasi judicial, the party to be bound thereby must have an opportunity to be heard, unless he has expressly or by reasonable or necessary implication waived that right."

§ 293. When Arbitrators may Meet without Notifying the Parties.

But the case, it appears, is otherwise when the question presented to the arbitrators is to be determined by the examination of books or other records, by mathematical computations, or by the special skill and knowledge of experts, as the value of a picture by an artist, or the computing of the damage to machinery and buildings by competent machinists and experienced builders. When, in such cases, it is apparent that the appraisers or arbitrators appointed were selected by the parties because of their special knowledge, and that it was the intention of the parties to rely wholly upon their information and judgment, the appraisers or arbitrators may proceed with the inquiry independent of the parties, and their award will be sustained.¹²⁷

§ 294. Distinction between Appraisement and Arbitration.

In several of the cases here cited, the courts distinguished between an appraisal, or a simple valuation, and arbitration. The distinction is sometimes made with difficulty, and is not entirely clear; but, however obscure, the difference is held by some of the

¹²⁵ 95 Ill., at page 545; McAuley v. Carter, 22 Ill. 53; Korf v. Lull, 70 Ill. 420.

¹²⁶ McAuley v. Carter, 22 Ill. 53; Korf v. Lull, 70 Ill. 420.

¹²⁷ See Norton v. Gale, 95 Ill. 533; Lee v. Hemingway, 3 Nev. & M. 860; Garred v. Macey, 10 Mo. 161; Curry v. Lackey, 35 Mo. 389; Garr v. Gomez, 9 Wend. (N. Y.) 649; Mason v. Bridge, 14 Me. 468; Rochester v. Whitehouse, 15 N. H. 468.

courts to be essential. Others treat the distinction as without a substantial difference.

In *Collins v. Collins*¹²⁸ the master of the rolls said: "It appears to me that the case of *Leeds v. Burrows* draws the proper and fit distinction between an 'arbitration,' in the proper sense of the term, and an 'appraisement' or 'valuation'; for valuation undoubtedly precludes 'differences,' in the proper sense of the term. It prevents differences, and does not settle any which have arisen." And to the same effect is *Russell on Arbitration*.¹²⁹

In *Kelly v. Crawford*,¹³⁰ a disagreement having arisen between the parties in regard to the balancing of accounts, the matter was submitted to an expert accountant, with authority to examine the books of both parties, and ascertain the amount due from one to the other, stipulating that the decision of the referee should be final and binding upon both parties. The court held that this was not a submission to arbitration, nor was the decision of the accountant in legal effect an award. The court made "a distinction between a case where there is something submitted to the judgment or discretion of the person chosen and one where he is to have no discretion." The matter in this case, of which party owed the other, and the amount of the balance to be ascertained from the books involved only a mathematical computation.

§ 295. When Notice of Meetings is Indispensable and When It may be Omitted.

In *Thomas v. West Jersey R. Co.*¹³¹ there were two arbitrators chosen, to whom was submitted the evidence and argument of the parties; but, being unable to agree, an umpire was appointed, who proceeded to consider the case in connection with the other two, without giving notice to the parties or affording them an opportunity to appear and present their case anew. This action was held by the court to be "misconduct in the sense of the law, and fatal to the validity of the award."

There are many very able authorities in support of the doctrine

¹²⁸ 26 Beav. 306.

¹³⁰ 5 Wall, 785.

¹²⁹ 3d Ed. 43.

¹³¹ 24 N. J. Eq. 568.

that it is not necessary to give the parties notice of the meetings of the arbitrators when the latter have been selected in reference to their special knowledge of the matters in dispute, and who may proceed, in the absence of the parties and without receiving evidence, to consider the matter submitted for their examination and award.¹³²

§ 296. When Award is Signed and Delivered, It cannot be Recalled; the Appraisement has Terminated.

When an award has been signed and delivered, and the arbitrators or appraisers have separated, they cannot come together again to reconsider the matter. With the delivery or publication of the award, the arbitrator has exercised the full measure of his authority, and can do no more. He is *functus officio*, and it has been held that he is without the power to correct even a palpable clerical error.¹³³ Before delivery and the separation of the arbitrators, the award, although signed, will be considered within the control of the arbitrators, and still subject to change or amendment.¹³⁴

§ 297. Submission need not be in Writing.

Unless it is required by the terms of the policy, the submission to arbitration need not be in writing. It will be sufficient if the

¹³² 2 Pars. Cont. 706, note N; *Eads v. Williams*, 31 Eng. Law & Eq. 203; *Brown v. Bellows*, 4 Pick. (Mass.) 178; *In re Pearl Street*, 19 Wend. (N. Y.) 651; *Brink v. Insurance Co.*, 5 Rob. (N. Y.) 104; *Town of Rochester v. Town of Chester*, 3 N. H. 349; *Wiberly v. Matthews*, 91 N. Y. 648; *Johnston v. Cheape*, 5 Dow, 247; *Eads v. Williams*, 24 Law J. Ch. 531; *Caledonian R. Co. v. Lockhart*, 3 Macq. 808; *Bottomley v. Ambler*, 38 Law T. (N. S.) 545.

¹³³ *Lansdale v. Kendall*, 4 Dana (Ky.) 613; *Russ. Arb.* 144; *Woodbury v. Northy*, 3 Greenl. (Me.) 85; *Clement v. Rohrabach*, 15 Pa. St. 116; *Talbott v. Hartley*, 1 Cranch, C. C. 31, Fed. Cas. No. 13,732; *Aldrich v. Jessiman*, 8 N. H. 516; *Fitzgerald v. Fitzgerald*, *Hardin* (Ky.) 227; *Clark v. Burt*, 4 Cush. (Mass.) 396; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Doke v. James*, 4 Comst. (N. Y.) 568; *Dudley v. Thomas*, 23 Cal. 365; *Smith v. Smith*, 28 Ill. 56; *Butler v. Boyles*, 10 Humph. (Tenn.) 155.

¹³⁴ *Byars v. Thompson*, 12 Leigh (Va.) 550; *Goodell v. Raymond*, 27 Vt. 241; *M'Kinstry v. Solomons*, 2 Johns. (N. Y.) 57.

arbitrators or appraisers are sworn, and caused to distinctly understand the nature and exact scope of the inquiry they have been appointed to make. This being done, the arbitration or appraisal can proceed in the manner provided in the policy. The appointment orally made will refer to the policy for particular instructions in regard to the subject to be considered. The policy, too, will express the limitations of their power and the full measure of the duty they are required to perform.¹³⁵

§ 298. Conclusions.

The conditions of a policy in respect to arbitration will be enforced by the courts only when such enforcement, by proper language, is made to precede a right of action.

If the stipulation to arbitrate is only collateral, it has no greater legal effect than a common-law agreement, and an action will lie on the policy without performance.

Submitting to arbitrators any particular matter in dispute, as the question of loss or damage, does not oust the courts of their jurisdiction. The case would be otherwise if the stipulation was to submit generally all matters affecting the company's liability. Such an agreement, whether or not made a condition precedent, is contrary to the policy of the law, and not enforceable.

The policy should designate the number of arbitrators and the manner of their selection. Where this was not done, it was held that the provision was indefinite and nugatory.

Either party may insist on arbitration, whether the loss be partial or total. Appraisal refers to the ascertainment of damage sustained when the property is not wholly destroyed. But arbitrators may consider evidence relating to the quantity and value of property that has ceased to exist, and their award will be final.

Arbitrators must act in good faith, and without the embarrassment and bias of previously formed opinions. Errors of judgment will not invalidate an award. When entering into the submission, the parties have allowed for the infirmities of judgment, but submission is based on the implied promise of absolute good faith. Only

¹³⁵ Greer v. Canfield, 38 Neb. 169, 56 N. W. 883.

fraud, collusion, and misconduct will be sufficient to set aside the award.

The inquiry of arbitrators must be confined to the subjects designated in the submission. Should they consider matters not referred, or omit important matters included in the submission, the award will not be sustained.

When particular matters of dispute have been submitted, and others reserved, the right of submission as to the latter will be deemed to have been waived, unless at the time of such partial submission the further right to submit is distinctly affirmed.

Arbitrators are not bound to follow the strict rules of law, unless so required by the terms of the submission. They may consider the question submitted in reference to the evidence offered by the parties, or act upon their own personal knowledge of the facts. When arbitrators are chosen, as they frequently are, because they are experts, being skilled in respect to the subject of inquiry, as builders and artisans, they may ignore the testimony of the witnesses produced, and base their award wholly upon the evidence of their own senses.

A person is not disqualified to serve as arbitrator because he has acted for either of the parties in different matters on other occasions.

Performance in respect to arbitration cannot be required, except within the terms of the policy. The parties, however, may agree either to extend or restrict the subjects of inquiry. By the assent of the parties interested, something wholly different from the terms of agreement expressed in the policy may be substituted. The powers of the arbitrators are all contained in the submission, and, unless the policy is referred to for a definition of their duties, its terms and stipulations will not authorize or restrain their actions.

Arbitrators may consider and decide questions of both law and fact. Arbitration is a court which the parties have created by their own appointment, to settle a particular matter. If a settlement of the disputed question referred involves a purely legal point, the award will be sustained, although the arbitrators have erred in their judgment of the law.

Arbitrators may do, while acting within the limits of their authority, all that the parties themselves could do by mutual agree-

ment; and, as parties are bound by foolish contracts, so, too, an award will not be set aside because it is unwise.

It will be presumed that the arbitrators have acted within the scope of their authority, and the burden of showing to the contrary will be on the party attacking the award.

Insurers may take the property at the valuation fixed by the arbitrators when the policy so provides.

Where arbitration and award are conditions precedent, the party seeking to recover must show performance, or that performance has been rendered impossible through the fault of the other party. When one party to an arbitration, either before or after an award, is silent on receiving notice from the other of revocation, consent will not be implied.

If, by the terms of the policy, an award is made a condition precedent, a refusal to arbitrate on the part of the insured will discharge the company; and, when an arbitration is entered upon, the failure of the arbitrators to agree on an award will not, in the absence of bad faith on the part of the company, give the insured a right of action on the policy.

All persons competent to make contracts may bind themselves by agreement to arbitrate; but persons acting for others under general powers will not have authority to bind in this respect those for whom they act. Ordinarily, to authorize a submission on the part of a person acting for another, the grant should be special, and not general.

An attorney at law will not have authority to submit the matter of his client to arbitrators before suit is brought. After suit he may agree to refer.

A partner who, in the ordinary business transactions of the partnership, is empowered to sign for the firm, will not have authority, by agreeing to a submission, to bind the firm. If, however, the other partners have knowledge of the proceedings, and express no dissent, they will be estopped from repudiating the arbitration on the ground that it was not their act.

Unless there has been misconduct, an award will not be set aside for the reason that the arbitrators are shown to have bad characters. When the parties choose their own court, the law will not

interfere to prescribe what its mental and moral qualifications shall be.

When the arbitrators selected are known to the parties as having formed an opinion, the award will be sustained. What the parties have known and presumptively assented to, acting in their own behalf, the courts cannot refuse, without a dangerous infringement of personal rights.

Arbitrators may appoint the time and place of meeting, but the parties must have notice and be afforded an opportunity to present evidence or make argument. When, however, the arbitrators meet only for conference, the parties need not be notified.

Arbitrators must act together when considering either evidence or argument.

When one of the three arbitrators withdraws during the progress of the investigation, the award of the other two will be good, if the submission provides, as it generally does, that the parties shall be bound by an award signed by any two of the three chosen.

When a person signs a submission for another without authority to do so, he will be personally liable for the performance of the award.

When the submission is to experts, if the umpire chosen by the two arbitrators first appointed is not an expert, the award will be bad.

As the appointment of an umpire must depend upon the "will and understanding" of the arbitrators first chosen, a selection by lot will not be permitted; but, when two persons have been nominated who the arbitrators both agree are competent, a choice may be determined in that manner.

A stockholder in a corporation will not be disqualified to serve as arbitrator in a matter where the corporation is concerned, unless it is made to appear that his interest as stockholder is sufficiently important to influence his judgment.

Submission to arbitrate is not a waiver of known defenses.

CHAPTER XV.

IRON-SAFE CLAUSE.

- § 299. Importance of Inventory and Books in Proving a Claim for Loss.
- 300. Books must Show a Record of Purchases and Sales.
- 301. Failure to Produce Books and Inventory at the Adjustment of Loss will not be Excused.
- 302. Books Need not be Kept in a "Safe," except During the Interval after Closing the Store at Night and Opening in the Morning.
- 303. The Words "Iron Safe" are not to be Construed Literally. By the Designation Nothing More is Warranted than the Protection of Such Safe as Those Ordinarily Used by Merchants and Other Business Men for the Same Purpose.
- 304. Conclusions.

§ 299. Importance of Inventory and Books in Proving a Claim for Loss.

The adjustment of loss claims is frequently a work involving much difficulty, on account of the inability of the insured to produce reliable data concerning the quantity and value of the property destroyed. This difficulty will always be experienced when the claim is for stocks of merchandise burned, and the claimant has failed to make occasional inventories, and to keep books showing the amount of purchases and sales. When mercantile business is conducted in this careless and unmethodical manner, as is often the case, there can be no reliable proofs of the loss sustained. The adjustment must necessarily proceed by difficult and uncertain processes to unsatisfactory results. If, as it will frequently happen, the "slippery memory" of the insured is the only basis of the computation, dangerous opportunities for fraud are presented. The dishonest claimant finds himself in a position of advantage, where no checks can be placed upon his rapacity. The embarrassed adjuster resorts to technicalities, and the tangle of fraud and suspicion ends, many times, in an unsatisfactory compromise, or an expensive and protracted litigation. To avoid complications of this character, and to secure adjustments, so far as possible, on the basis of

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mathematical computations, the practice is gaining much favor with underwriters of incorporating into their policies a "condition" that inventories shall be made at stated periods, and that books of account shall be kept, showing purchases and sales, and that such inventories and books shall be deposited during the nighttime in an iron safe. This condition, when properly expressed, has been sustained by the courts, so far as we have examined the adjudicated cases.¹ It is founded on conservative business principles, and will impose prudent restrictions upon lawless cupidity, and tend to promote justice and establish confidence between the insured and insurer, at a time when good faith and mutual respect are matters of the highest consideration.

§ 300. Books must Show a Record of Purchases and Sales.

In *Pelican Ins. Co. v. Wilkerson*² the policy contained a clause making it a warranty that the assured should keep a set of books showing a record of all business transactions, including purchases and sales for cash and on credit, and that an inventory should be taken of the stock, and be kept with such books, locked in a fire-proof safe at night, and at all times when the store was not open for business, or in some secure place, not exposed to a fire which could destroy the store, and that the books and inventories should be produced, in case of loss, for the inspection of the adjuster, and, failing to produce the same, the policy should be void. It was shown by the evidence admitted at the trial that the assured did take an inventory of the stock, and that it was produced and ex-

¹ *Landmann v. Insurance Co.*, 18 Ins. Law J. 813; *Goddard v. Insurance Co.*, 67 Tex. 69, 1 S. W. 906; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *East Texas Fire Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. 720; *Western Assur. Co. v. Altheimer*, 58 Ark. 565, 25 S. W. 1067; *Home Ins. Co. of New York v. Delta Bank*, 71 Miss. 608, 15 South. 932; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507; *Sneed v. Assurance Co. (Miss.)* 18 South. 928; *Palatine Ins. Co. v. Brown (Tex. Civ. App.)* 34 S. W. 462; *Goldman v. Insurance Co. (La.)* 19 South. 132; *Northwestern Nat. Ins. Co. v. Mize (Tex. Civ. App.)* 34 S. W. 670; *American Fire Ins. Co. v. Center (Tex. Civ. App.)* 33 S. W. 554; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W. 1027.

² 53 Ark. 353, 13 S. W. 1103.

hibited to the adjuster a few days subsequent to the fire, but that this inventory was afterwards lost. The principal contention between the parties related to the question of whether the assured had complied with the terms of the policy in regard to keeping books containing a record of his purchases and sales. We quote from the opinion of the court: "While it may be that, being a country merchant, whose system of bookkeeping was known to appellant, he was not required to keep a full set of commercial books, yet it was his duty to comply with the agreement contained in the policy. This the contract required as a condition of the performance upon which his right of recovery depended.³ The books kept by appellee were not destroyed. He testified that he kept a 'credit or sale' book, showing all credit sales; that he kept a 'cotton book,' showing all cash and goods paid for cotton; that he kept a 'cash account,' showing all cash taken in, and copies of bills of purchase, showing all goods purchased; that his last inventory was taken on the 1st of April, 1888, and showed the value of the stock on hand to be \$1,811; that he estimated that goods of the value of \$1,874 were destroyed by the fire. The books and papers were all exhibited to the jury, except some invoices which had been lost. Appellee testified that he kept a merchandise account and a cash account, which are copied in the bill of exceptions, and it appears at the end of each month he entered the amount of purchases during the month, and that he kept a book in which he entered each day his cash sales, and that at the end of each month he entered the aggregate amount of cash received on his books. We give a specimen of the manner in which the books were kept: 'Page 202, Taylor, Duffee & Co., Memphis, Tenn., 1887, June goods, \$855.01; July goods, paid \$435.96. * * * In stock at the first of June, 1887, up to April 1, 1888, page 203, W. Y. M. Wilkerson, 1887, June, to money taken in, \$40. July, to money taken in, \$90. Paid Taylor, Duffee & Co., paid June, \$10, one bale of cotton that was lost in 1886, \$42. September, to money taken in, \$40,' etc. It is impossible to obtain any correct or satisfactory idea of the amount of goods on hand and destroyed by the fire from this mode of bookkeeping. For aught the books show,

³ May, Ins. §§ 156, 184.

goods of the value of \$100 may have been sold for \$40, as the items are not given, but only the aggregate amount of sales. * * * The appellee having failed to keep a set of books showing a record of all business transacted, including purchases and sales for cash or credit, as he undertook to do, was not entitled to recover."

In this case books were kept, but the court held that they must contain a record of the business, which it was clearly pointed out they did not do. Purchases and sales must be shown, as required by the condition. A chaos of names and figures was not what the insurer had stipulated for. There must be an orderly and intelligible statement of the business,—such a record as a person of ordinary intelligence, accustomed to accounts, could understand, and from which an accurate computation of the loss claimed could be made. The purpose of this condition, in regard to taking an inventory and keeping books, is obvious. The adjustment of loss claimed on account of the destruction of stocks of merchandise is impossible, and frauds of the most flagrant character are frequently possible, without the reliable data stipulated for by this clause of the policy. When an inventory has been made, showing the quantity, character, and value of the stock on hand at some particular date, and books are intelligently kept, showing subsequent purchases and sales, the process of adjustment requires only the skill of an ordinary accountant; but, when these important records are not supplied, a satisfactory estimate of the loss will generally be found impossible. All of the requirements of the "condition," it will be seen, are as indispensable as any one of them. Without the inventory there will exist no definite time from which the computation can begin, no reliable statement of values which will constitute the basis of the subsequent estimates. If the record of purchases is lost, the operation will manifestly be defeated, as the results sought involve the consideration of every addition to the values shown by the inventory, and so, too, must the sales, both for cash and credit, be definitely shown; otherwise, the processes of computation will necessarily be incomplete and abortive. Should a record of the credit sales be presented, and the sales for cash omitted, the inventory and the record of purchases and credit sales will all be useless, for there is still a link wanting in the chain of evidence, without which all the other facts can serve no important

purpose. It is like a bridge across a stream, with one section gone. We cannot pass. The warranty, therefore, embraced in what is known as the "iron-safe clause," requires that an inventory be made at stated periods, that books shall be kept in an intelligent manner, showing all purchases and sales, and that such inventory and books shall be kept in an iron safe or other secure place, and produced, should a loss occur, for the examination of the company's adjuster; and should there be a failure on the part of the insured to perform in any one of these particulars, he will forfeit all right to recover under the policy.*

§ 301. Failure to Produce Books and Inventory at the Adjustment of Loss will not be Excused.

In *Landmann v. Hartford Fire Ins. Co.*⁵ this question was presented and discussed by King, J., of the civil district court for the parish of Orleans, La. The plaintiff had insured with the defendant company \$300 on his store building and \$1,250 on his stock of general merchandise. The policy contained what is known as the "iron-safe clause," which provided that the insured should keep a set of books showing a record of his business, including all purchases and

* In *Palatine Ins. Co. v. Brown*, *supra*, the Texas court reviewed all the cases referring to this class of warranties. The Palatine policy expressed the "non-safe" warranty in the usual form. It provided that plaintiff should keep books, showing a complete record of his business, and that such books should be kept in an iron safe at all times when the store was not open for the transaction of business. It was agreed that the books had been kept in safe as warranted, except that the blotter containing the daily record of business had been left out on that occasion, and was destroyed by the fire which consumed the stock. All the other books were saved, and, except the business of a single day, the last one before the fire, the record was complete. The contents of the "blotter" had from day to day been transcribed to the "daybook," and it was admitted that the books saved presented a complete history of all transactions relating to the business insured, except for that one day, when the records of the blotter had not been transcribed to the daybook, and it was admitted, too, that the loss of the blotter did not materially increase the difficulty of proving the loss. The court held that there must be a strict compliance with the terms of the warranty, and that the question of materiality was irrelevant, and could not be considered.

⁵ 18 Ins. Law J. 813.

sales, both for cash and on credit, together with a copy of his last inventory, and that the books and inventory should be kept in an iron safe during the nighttime. The evidence introduced in the trial of the case showed that an inventory had been taken, and that books were kept in the usual manner of country merchants. On the night of the fire, which occurred between 1 and 2 o'clock in the morning, plaintiff's son and his clerk continued at work writing up the books until about 12 o'clock, and, when completing their labors, being much wearied, went to bed, not having placed the books in the iron safe, and all were burned, except a book of invoices, which had not been taken out of the safe at the beginning of the previous day's business. The evidence of the plaintiff, his son, and his clerk was to the effect that the insured building was of the value of \$800, and that the value of the stock was from \$3,500 to \$4,000. The defendant claimed that the iron-safe clause, before referred to, constituted a warranty, and that, its terms having been violated, the company was not held for the loss. We quote from the opinion of the court:

"In this case there is no room for interpretation or construction. The language used in expressing the clause is free from any ambiguity. It is printed in large type, annexed to the face of, and is clearly a part of, the policy. Its purpose was to enable the company, in case of loss, to procure satisfactory evidence of the extent of the loss, to protect it against unfounded augmentations of the value of the property destroyed, and to enable it to obtain other evidence than that of the assured and his employés, however honest and correct they may be, of the damage sustained. Its purpose was also to enable the assured to make his loss mathematically certain, and protect him against unfounded deductions. It was the plain intention of the parties that, in case of loss, the books were to be the basis of the adjustment, and, to enable them to be produced, it was made a part of the policy that they should be kept in an iron safe. This the assured promised to do. The iron-safe clause in a policy is a promissory warranty. Being a warranty, a part of the contract, it is in the nature of a condition precedent to a right of recovery, and the party whose rights are dependent upon such a condition must show that he has performed it. 'Agreements legally entered

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into have the effect of laws on those who have formed them.'⁶ The court cannot add to or detract from the law they have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it. However foolish, improvident, or immaterial it may be, it must be substantially complied with. In this case the clause has been violated. It has not been substantially complied with. It is no compliance, in substance, by the assured, with his promise to place his books in his iron safe 364 days out of the 365 days in the year, if the day on which the property was burned was the day in the year on which the books were not placed in the iron safe, nor is it in compliance, in substance, to place only the invoice book, showing the purchases, and leave out the books showing the sales, both for cash and on credit, the daily transactions, and a copy of his last inventory of stock. The invoice book was of no service alone. * * * Nor is it a defense to say that the evidence of the loss is conclusive, and is supplied from other sources. The assured promised, in case of loss, his books showing his business should be subject to the inspection of the defendant, and the defendants relied upon the production of the books to furnish them with evidence of the exact extent of loss. Plaintiff has failed to comply with his promise, failed to supply the evidence required in the policy, and he cannot now be permitted to prove his loss by other evidence, however conclusive."

The legal proposition here affirmed cannot, we think, be successfully disputed. It was as lawful as it was wise for the parties to agree, in advance of the loss, on what character of evidence the liability of the insurer, as well as the right of the insured to recover, should rest. As prudent, intelligent men, they could have easily anticipated the difficulty that would attend their most skillful efforts to establish, after its destruction, the quantity and value of a stock of merchandise without certain necessary data being previously provided. They could have foreseen the uncertainty that would be involved, the distrust and contention that were possible to arise, and the insurer may well have declined to forego the chances of gain from the venture, rather than to incur the hazard of an adjustment without such proofs of loss as could be made the basis of an in-

⁶ Rev. Civ. Code La. art. 1901.

telligent judgment. This was properly required and made a condition precedent in the case last considered, and the court reached the only conclusion possible, that, as the plaintiff had failed in performance, there could be no recovery.

§ 302. Books Need not be Kept in a "Safe" except During the Interval after Closing the Store at Night and the Opening in the Morning.

In *Jones v. Southern Ins. Co.*⁷ the policy insured a stock of merchandise for \$3,000, containing the following clause: "The insured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of all business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory, and in the event of failure to produce the same this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." The statement of facts shows that plaintiffs were engaged in the mercantile business in a country town; that they had a safe, and that suitable books were kept to show a complete record of their business; that it was plaintiff's custom, and that of other merchants in the same village, to keep their store open for the transaction of business until 8 or 9 o'clock in the evening, after which the door was locked, and the clerk would then proceed to make such entries on the books as were needed to complete the record of the day's business; and, while thus engaged, if a customer knocked for admission, the door would be opened and his wants receive attention. On the evening of the fire, the clerk was engaged with the books as usual, between 9 and 10 o'clock, when invited by a friend to the adjoining premises to eat a plate of oysters, and dur-

ing his absence from the store the fire broke out which destroyed the stock. The contention of the parties referred to the proper construction of that part of the clause quoted, which required the insured to keep the books and inventory in an iron safe "at night," and at all times when the store was not open for business. The case was tried before Caldwell, J., who said: "Literally, night is that part of the natural day between sunset and sunrise. Are the words 'at night' in the policy in suit to be given that meaning? The object of this clause is to provide against the loss of the merchant's books by fire. The loss of the books by fire in the daytime is just as injurious as their destruction at night. Why, then, did not the insurer stipulate that the books should be secure from destruction by fire at all times? For the obvious reason that the books must be used during the time that business is carried on, and to that end they must be kept on the desk or counter of the store; but after the business of the day is over, and there is no longer occasion to use the books, and the store is closed for the night, there is no hardship in requiring that they should not be left to the hazard of destruction by fire. Besides, as long as there is some one in the store transacting or conducting any necessary business operation of the store, there is the chance that in case of fire the books may be saved, but that chance is gone when the store is closed for the night. * * * The proper construction of the policy is, not that books shall be kept in the safe from sunset to sunrise, but that they shall be so kept from the time the business of the day is ended and the store closed for the night. It is a part of the business day, and not 'night' within the meaning of the policy, so long as the store is kept open and business transacted, though it be 8, 9, or 10 o'clock at night; in other words, within the meaning of the policy, night begins when the business of the day ends." ⁸

⁸ *Liverpool & London & Globe Ins. Co. v. Morris*, 84 Ga. 759, 11 S. E. 895; *Sprott v. Association*, 53 Ark. 215, 13 S. W. 799; *Brown v. Insurance Co.*, 74 Iowa, 428, 38 N. W. 135, and 18 Ins. Law J. 137.

§ 303. The Words "Iron Safe" are not to be Construed Literally. By the Designation Nothing More is Warranted than the Protection of Such a Safe as Those Ordinarily Used by Merchants and Business Men for the Same Purpose.

The designation "iron safe" is not construed to mean an iron receptacle for books and papers that will be an absolute protection against fire. The words are not used in their literal, but in the popular and ordinary, sense. The merchant who warrants to keep his books securely locked during the nighttime in such a safe will need, in showing performance, to do no more than establish the fact that his records were contained in an iron safe of such character as is in common use by other merchants and business men for the same purpose. Whether or not the warranty had been performed will be a question for the jury.⁹

Substantial compliance with the "iron-safe" clause requires the keeping of a suitable safe, such a one as will afford reasonable protection under such circumstances as each particular case presents. What would be necessary in an ordinary dwelling or small country store would often be wholly insufficient in a manufacturing establishment, where the safe would be exposed to great intensity of heat in case of a conflagration. Ordinary judgment and good faith are demanded of the insured, and when this is shown he may be excused from literal performance.

This is illustrated in a Texas case. The books were in an "iron safe," and, while the store was on fire, a clerk in the employ of the insured, solicitous for the greater safety of the books, undertook to remove them from the "safe," and in his hurried effort to do so one of them dropped on the floor, where it was burned. The court was of the opinion that there had been substantial performance, or that performance was excused.¹⁰

⁹ Sneed v. Assurance Co. (Miss.) 18 South. 929. See, also, Knoxville Fire Ins. Co. v. Hird, 4 Tex. Civ. App. 82, 23 S. W. 393.

¹⁰ East Texas Fire Ins. Co. v. Harris, 7 Tex. Civ. App. 647, 25 S. W. 720.

§ 304. Conclusions.

The "iron-safe" clause is intended to secure for the benefit of both the insurer and insured a short, easy, and reliable means of proving a loss. The production of books and invoices facilitates an honest computation of the claim, and often defeats fraud. The warranty refers to that which is most sensible in business, and to that which is most righteous in law, and has been enforced by the courts without exception.

A performance of the warranty requires that books shall be kept so as to show, in an intelligible form, a record of the business to which the insurance refers. If it be a manufacturing risk, books must show purchases of raw material and sales of manufactured stock, and to these must be added the indispensable manufacturing account. If the risk be a stock of merchandise, there should be the occasional inventory, and books showing both purchases and sales.

The books and last inventory must be kept in an iron safe during such times as the store or office is not open for the transaction of business. Failure to perform in this respect will cause a forfeiture, if the insured is not able to produce all the books necessary to show a complete record of the business, after a loss.

CHAPTER XVI.**ILLEGAL BUSINESS.**

§ 305. Policies Covering Property Used or Appropriated for Carrying on Illegal Business are Void.

306. When the Courts will not Compel Payment of the Premium.

307. What is Illegal Business.

308. Conclusions.

§ 305. Policies Covering Property Used or Appropriated for Carrying on Illegal Business are Void.

Courts are instituted for the purpose of maintaining justice and preserving the "social compact" by orderly and peaceful methods. The chief object is, of course, to protect society from the dangers that would frequently result from strife and violence on the part of its individual members. The laws which the courts have been created to enforce are not intended to restrict the liberties of the citizens, only so far as liberty is opposed to stability and order,—only so far as it will disturb the tranquillity of society, and endanger the lawful rights of its members. Society is organized upon the basis that each individual shall surrender something of his natural rights, in consideration of the benefits he may enjoy from having others do the same. There is an implied agreement that each shall act in reference to his own in such a manner that the general good shall be conserved. When contracts between individuals are not repugnant to morality, or to public policy, it will be the duty of the courts to lend their aid to enforce them. The state has ordinarily no further concern in the matter than to perform its obligations by compelling contracting parties to perform theirs; but it will be otherwise when the contract, in its execution, involves the subversion of morality or the rights of the state, which represents society in its most concrete form. The social organization has gained its units of accretion during many centuries of experience and effort. Its evolution has cost millions of lives and incalculable sums of money. Society has been of slow and difficult growth. It is something of priceless value, and

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its integrity must be guarded with a care which is due to no other interest. When persons, therefore, enter into agreements that are inimical to the state or subversive of morality, they will not be enforced by the courts. There are many things which may not be the subject of an insurance contract that are not mala in se,—that involve no moral turpitude, independent of the fact that they are prohibited by statute. Such, for instance, are certain trades and professions, which are forbidden by statute to be carried on without first procuring a license. This requirement may be for the purpose of revenue, or for the purpose of regulating the business by state control; but, whether the business be mala prohibita or mala in se, a contract of insurance made for its protection would be opposed to public policy and void.

“When the laws of a state provide restrictions upon individuals, etc., foreign or domestic, which regulate the manner in which they shall do business or prohibit a business except on certain conditions, any contract with such individuals, which, if sanctioned, would encourage them to abate such laws, is void.”¹

§ 306. When the Courts will not Compel Payment of the Premium.

When the policy of insurance is issued to protect property embarked in a business prohibited by law, it is well settled that the courts cannot be invoked to compel the payment of the premium. The contract not being one that can be enforced, the promise to pay is without consideration, and, the premium having been paid, an action to collect it back cannot be maintained. The courts will not interfere to protect the wrongdoer or to assist parties engaged in an unlawful business.²

¹ *Swords v. Owen*, 43 How. Prac. (N. Y.) 176; *Young v. Robertson*, 6 Phila. 184; *Hall v. Franklin*, 3 Mees. & W. 259; *Otis v. Harrison*, 36 Barb. (N. Y.) 210; *Chesbrough v. Wright*, 41 Barb. (N. Y.) 28; *Mutual Benefit Life Ins. Co. v. Davis*, 12 N. Y. 569; *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Bank of British Columbia v. Page*, 6 Or. 431; *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526; *Thomson v. Thomson*, 7 Ves. 470.

² *Jenkins v. Power*, 6 Maule & S. 289; *Stevenson v. Snow*, 3 Burrows, 1237; *Tyrie v. Fletcher*, Cowp. 666; *Lowry v. Bourdieu*, 2 Doug. 470.

There is, perhaps, no other business in which persons engage where a larger measure of good faith and confidence is required than that of insurance. The company has a right to know with whom it is dealing. It cannot afford to offer its promises of indemnity to dishonest persons, and public policy forbids that it should do so. The destruction of property by fire is always a loss to the state. There has been something deducted from the common wealth for which no equivalent is returned. The wealth of society consists largely in the wealth of its individual members. A loss to one affects, in some measure, the well-being and happiness of all. The fact that the owner may be a rogue does not materially change the case. The property burned has a substantial value, and, in its uses, might benefit others besides the owner. The interest of the underwriter, in knowing with whom it contracts, whether they be honest or dishonest, whether they are engaged in legitimate undertakings or pursuing a business in violation of law, is primarily in being able to protect itself against the extraordinary hazards that always belong to ventures that are not firmly based on moral and business character. The state has an interest as before remarked, as well as the individual, in the preservation of property; and, besides this, it has other interests of great importance, growing out of wholly independent considerations. To illustrate, suppose the law forbids the sale of intoxicating liquors without first obtaining a license, but, in disregard of the statute, Brown opens a saloon, and offers drink to such as may wish to buy. The business, of course, in which he is engaged, is illegal. He opposes himself to the majesty of the law, disregards its authority, and, so far as his efforts and influence go, in this respect is a public enemy. When insurance is offered to protect property thus engaged, the effect is to give support, encouragement, and character to a business which the state is trying to suppress or regulate, and it very properly declines to recognize the validity of such contracts.³

³ Kelly v. Worcester Mut. Fire Ins. Co., 97 Mass. 284; Boardman v. Insurance Co., 8 Cush. (Mass.) 583; Kelly v. Home Ins. Co., 97 Mass. 288; Heller v. Crawford, 37 Ind. 279; Carrigan v. Insurance Co., 53 Vt. 418, 10 Ins. Law J. 606; Pollard v. Insurance Co., 63 Miss. 244, 15 Ins. Law J. 376.

§ 307. What is Illegal Business.

In *Doe v. Burnham* * the action was brought to recover on a note given for the sale of liquors, in violation of the statute. The court said: "It has been settled by repeated decisions in this state that the consideration agreed to be paid for spirituous liquors, sold without license and contrary to the statute, cannot be recovered. The sale being prohibited by statute, and the vendor being liable to a criminal prosecution for selling the same, it is made illegal, and the price cannot be recovered, and it makes no difference whether the action be brought on the original contract, or upon a promissory note given for the amount." ⁵

Emerigon states the law to be: "An insurance on property intended to be employed in carrying on trading adventures, contrary to the revenue laws of the state where the contract is made or sought to be enforced, is void. No court, consistently with its duty, can lend its aid to carry into execution a contract which involves a violation of the laws which that court is bound to administer." ⁶

In *Johnson v. Union Marine & Fire Ins. Co.* ⁷ the policy was issued to A. and B., as co-partners, and covered specifically on different subjects as follows: \$500 on three billiard tables, balls, and cues; \$500 on bar, saloon fixtures, furniture, and pictures; \$100 on stock in trade, chiefly liquors and cigars, including glass and other wares. It was in proof, on the trial of the case, that one of the parties had procured a license, not for the firm, but for himself individually; that the stock was owned jointly; that the furniture

* 31 N. H. 426.

⁵ See, also, *Caldwell v. Wentworth*, 14 N. H. 431; *Pray v. Burbank*, 10 N. H. 337; *Adams v. Hackett*, 7 Fost. (N. H.) 289; *Roby v. West*, 4 N. H. 287; *Coburn v. Odell*, 10 Fost. (N. H.) 540; *Gorsuth v. Butterfield*, 2 Wis. 237; *State v. Greenleaf*, 31 Me. 517; *Webber v. Howe*, 36 Mich. 150; *Inhabitants of Webster v. Sanborn*, 47 Me. 471; *Bull v. Harragan*, 17 B. Mon. (Ky.) 349; *Curran v. Downs*, 3 Mo. App. 468; *Best v. Bauder*, 29 How. Prac. (N. Y.) 489.

⁶ 3 Kent, Comm. (13th Ed.) 262; *U. S. v. The Paul Shearman*, 1 Pet. C. C. 98, Fed. Cas. No. 16,012; *Richardson v. Insurance Co.*, 6 Mass. 102; *Russell v. De Grand*, 15 Mass. 35; *Gray v. Sims*, 3 Wash. C. C. 276, Fed. Cas. No. 5,729.

⁷ 127 Mass. 555; *Lawrence v. Insurance Co.*, Id. 557, note; *Kelly v. Insurance Co.*, 97 Mass. 288.

was used in connection with the carrying on of an unlicensed trade. The court said: "If a person is engaged in the unlawful business of selling intoxicating liquors without license, at the time of making and accepting a policy of insurance on his stock in trade and for a month afterwards, the policy does not attach, although he made application for license after he began such business."

In *Boardman v. Merrimac Ins. Co.*⁸ the court said: "When the direct purpose of the contract is to effect, advance, or encourage acts in violation of law, it is void."

See, also, *Phillips on Insurance*.⁹ We quote: "A contract of indemnity is void if, in incurring the risk, or permitting indemnity against it, it is in contravention of the provision or obvious policy of the law." This principle, so far as our inquiry has gone, has been recognized by all the authorities.

Chancellor Kent states the law as follows: "Where it is made to appear that the prosecution of the business violates the provisions of the statute, a policy of insurance upon the property is void."¹⁰

In *Andrews v. Essex Fire & Marine Ins. Co.*¹¹ the opinion was by Justice Story. He said: "It is perfectly settled that underwriters, by the general terms of the policy, are not liable for any loss arising from any foreign, illicit trade, unless the policy be underwritten with a full notice on their part that such was the object of the voyage."

A very concise statement of the principles of law under discussion is given by the supreme court of Alabama in deciding the case of *Black v. Oliver*.¹² The court said: "It is a well-established principle of law that all bargains or agreements which have for their object anything repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void." The facts in that case were that the defendant in error had sold a slave at a very low price, with the understanding and agreement

⁸ 8 Cush. (Mass.) 583.

⁹ (5th Ed.) § 736.

¹⁰ *Carrigan v. Insurance Co.*, 53 Vt. 418, 10 Ins. Law J. 606; *Clark v. Insurance Co.*, 1 Story, 109, Fed. Cas. No. 2,832; *Wilson v. Marryat*, 8 Term R. 31; *Bird v. Appleton*, Id. 562; 1 Smith, Lead. Cas. 154; *Kelly v. Insurance Co.*, 97 Mass. 284; *Andrews v. Insurance Co.*, 3 Mason, 6, Fed. Cas. No. 374.

¹¹ 3 Mason, 6, Fed. Cas. No. 374.

¹² 1 Ala. 449.

that the purchaser would emancipate and make her his wife. The judgment of the court was based on the fact that such marriage could not be consummated under the laws of the state, and that the intention of the parties, it must be presumed, was that the slave should live with the purchaser in a state of concubinage, and that the agreement, therefore, being contrary to law, morality, and public decency, could not be enforced, and that the purchaser "acquired the property discharged from the performance of the condition."

The Alabama court quotes from Lord Chief Justice Wilmot, in *Collins v. Blantern*,¹³ as follows: "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community. It is void by the common law, and the reason why the common law says such contracts are void is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this. No polluting hands shall touch the pure evidence of justice."

The New York courts have held that the owner of a building, which he rented to be used for an illegal purpose, could not maintain an action in that state to enforce payment of the rent.

The statute of New York provides against the contribution of money to influence or control votes at the public elections. The plaintiff owned a log cabin in that city, which the defendant rented for the use of the Whig party during the canvass preceding the election of 1840. The rent was not paid as agreed upon, and suit was brought for its collection. It was held that, as the building was rented to be used for a purpose that was in violation of the statute, the assistance of the courts could not be had to enforce payment of the rent. We quote from the opinion: "To what end was the 'log cabin' to remain? The plaintiff tells us that the building, besides the sale of refreshments, was intended and calculated for public and other meetings of a certain political party, and the consideration for the promise was that the plaintiff would not tear down or remove the log cabin, but suffer the same to remain for the benefit of the said Whig party until after the election. It was kept open to promote the election of the electoral ticket in favor of General Harrison for president. The statute says: 'Such expenditures of money shall not be lawful.' * * * It is said that the statute only forbids the contribution of money for corrupt purposes, but the statute says

¹³ 2 Wils. 347.

nothing about corruption. It declares that the thing should not be done."

In *Swanger v. Mayberry*¹⁴ the court said: "The general principle is well established that a contract founded upon illegal considerations, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist in part therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy."¹⁵

It was said, in *Scudder v. Andrews*:¹⁶ "No contract is valid which is made in contravention of the law or of public policy."¹⁷ In *Downing v. Ringer*,¹⁸ after quoting from *Chitty on Contracts*¹⁹ in support of the doctrine here affirmed, the court added: "The cases in this country are uniform in declaring the principle that, if a note or other contract be made in consideration of an act prohibited by law, it is absolutely void, and the illegality of the contract will constitute a good defense at law as well as in equity."²⁰ Parker, C. J., in *Russell v. De Grand*,²¹ said: "The rule of law is of universal operation that no one shall by the aid of a court of justice obtain the fruits of an unlawful contract."²²

§ 308. Conclusions.

The courts will not lend their aid to enforce contracts made in violation of law, or in the interests of a business that it is the policy of the law to repress.

Courts are maintained to give effect to the mandates of the law by

¹⁴ 59 Cal. 91.

¹⁵ *Pratt v. Draughon*, 21 La. Ann. 194; *Scudder v. Andrews*, 2 McLean, 464, Fed. Cas. No. 12,564.

¹⁶ 2 McLean, 464, Fed. Cas. No. 12,564.

¹⁷ *McWilliams v. Bryan*, 21 La. Ann. 211; *Overby v. Overby*, Id. 493; *Downing v. Ringer*, 7 Mo. 585.

¹⁸ 7 Mo. 585.

¹⁹ *Chit. Cont.* 230.

²⁰ 2 Kent, Comm. 466; *Russell v. De Grand*, 15 Mass. 35.

²¹ 15 Mass. 35.

²² *Williams v. Woodman*, 8 Pick. (Mass.) 78; *Buck v. Alfee*, 26 Vt. 184.

orderly and peaceable process, to uphold public morality, and with a force unattended with violence to suppress the evil doer.

When persons make contracts that are inimical to the state or subversive of morality, the agencies of the law cannot be employed to compel performance. It is immaterial whether such contracts are mala in se or mala prohibita, as it is equally the duty of the courts to preserve the integrity of the law and to suppress that which is inherently vicious.

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CHAPTER XVII.**IN REGARD TO BUILDINGS.**

- § 309. Valued Policy Laws.
- 310. When is a Building Wholly Destroyed.
- 311. Principles of Construction.
- 312. "Wholly Destroyed" Refers to Values, instead of Species.
- 313. That cannot be Wholly Destroyed Which Remains of Great Value.
- 314. When Buildings shall Fall, except as the Result of Fire.
- 315. Proximate Cause.
- 316. It is the Building that is Insured, not the Material of Which it is Composed.
- 317. Damage to Party Walls.

§ 309. Valued Policy Laws.

It is now a law in several of the states that when buildings are insured, and afterwards "wholly destroyed," the sum written in the policy is the measure of damage. These statutes are generally referred to and designated as "valued policy laws." Among the states having such laws are Texas, Missouri, Ohio, New Hampshire, and Wisconsin. The state last named has the distinguished honor of being the pioneer in this class of legislation. This departure in the direction of restrictive legislation dates back to 1874, and grew out of abuses on the part of certain farm insurance companies that were fast subverting business morality, and endangering the security of property interests. Section 1943 of the Revised Statutes of Wisconsin reads as follows: "Whenever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed without criminal fault on the part of the assured or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damage when destroyed."

§ 310. When is a Building Wholly Destroyed?

The courts have had frequent occasion to consider questions arising under the terms of these valued policy laws, and perhaps all of them at one time or another have given a construction, some distinct, others qualified, of the words "wholly destroyed." I can find no case that has been brought before the supreme court of Wisconsin where the construction of these words has been squarely presented. While the distinguishing provisions of the law have been frequently before that court, in no instance that I can find has it been contended that the property was not actually and entirely destroyed, except perhaps in *Seyk v. Millers' Nat. Ins. Co.*¹ In that case the court said: "The evidence is that all the combustible material in the structure was destroyed, and, although portions of the brick walls were left standing, they were useless as walls, and most of the bricks therein were spoiled by the heat. It cannot be doubted that the identity and specific character of the insured buildings were destroyed by fire, although there was not an absolute extinction of all the parts thereof. This was an entire destruction of the building, within the meaning of the statute."

From the facts as stated, the conclusion of the court cannot well be challenged, that, while portions of the walls were left standing, they were of no value, as they would need to be taken down, and that the brick had been spoiled by the heat. If there was any value in the débris, the court probably was of the opinion that it was not worth more than the cost of recovering it, and what was said in regard to the building having lost its identity was merely verbiage, and not understood to signify the sanction of a ruling formed on that uncertain basis for determining when a building is wholly destroyed. If it is disputed that the Wisconsin court so intended, why did they so particularly refer to the significant fact that the walls must be taken down, and that the bricks of which they were constructed were of no value, having been spoiled by the heat? It could not be material whether the broken walls could be used in rebuilding, or wheth-

¹ 74 Wis. 67, 41 N. W. 448. The first decision made by the Wisconsin court, under its statute, was in the case of *Reilly v. Insurance Co.*, 43 Wis. 449. The property, it was not disputed, was entirely consumed by the fire.

er the bricks were sufficiently preserved to be relaid in the construction of new walls, if it were the form and specific character of the building, and not values, that the court was considering in reference to "wholly destroyed." What relation has this careful and almost critical inquiry in regard to the security of the walls, and the condition of the burned and broken brick, if the court understood that the totality of loss was to be determined by a method or rule arbitrary in its character, and independent of values that might have been represented by the small section of the wall that had not fallen down?

There is another consideration of importance which must have been present to the mind of the court when deciding the Seyk Case. It will be observed with interest that section 1943 of the Statutes of Wisconsin does not contain the word "building." It reads, "Whenever any policy of insurance shall be written to insure real property," etc. A damaged and crumbling wall is certainly "real property," and as much so as the building of which it was a part. And if such wall, either in its own character, or on account of the material of which it is composed, represents, after the fire, any substantial value, then the "real property" insured is not wholly destroyed. This proposition, I think, is too plain to be successfully refuted.

The case of *Harriman v. Queen Ins. Co.*² refers with much particularity to the evidence, which clearly showed that the destruction by fire had been complete. It is said that no portion of the brick walls remaining could be used in rebuilding it, that the foundations so remaining were not sufficient to support a building of the weight and dimensions of that burned, that the expense of removing the worthless fragments of the old building would at least equal the value of all material left after the fire, and that such material was worth less than the cost of removing it. Why should Judge Lyon have taken pains to mention these facts, which could in no sense have been important if the court sanctioned the rule of interpretation given by Judge Dyer in *Oshkosh Packing & Provision Co. Case*?³ What significance had the facts stated, that the foundation was so much weakened by the fire that it could not be used in rebuilding, and that the material not actually destroyed was worth less than

² 49 Wis. 71, 5 N. W. 12.

³ 31 Fed. 200.

the cost of removing it, unless the court understood that if the facts were otherwise the real property insured would not be, within the meaning of the policy, wholly destroyed? From the case last referred to, decided by the United States circuit court, I quote: "The expression 'wholly destroyed,' in this statute, is equivalent to 'total loss,' and 'total loss,' as applicable to a building, means, not that the material of which it is composed was utterly destroyed or obliterated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and instead thereof has become a broken mass, or so far in that condition that it cannot be properly any longer designated as a building. When that has occurred, there has been a total destruction or loss." While not wanting in respect for the legal acumen of the judge who decided this case, I think he has not apprehended the true meaning of the Wisconsin statute referred to. In order to understand fully the intent of this law, we must first understand the exigencies, before explained, that made such legislation necessary, the nature of the contract to which it relates, and the objects to be secured. Judge Cole, in his opinion in *Reilly v. Franklin Ins. Co.*,⁴ said: "The manifest policy of the statute is to prevent over-insurance, and to guard, as far as possible, against carelessness, and every inducement to destroy the property, in order to procure the insurance upon it. Where property is insured above its value, a strong temptation is presented to an unscrupulous and dishonest owner, either to intentionally burn it, or not guard and protect it as he ought. Not sharing in the risk with the insurer, it is for his advantage that it be destroyed, and it is often destroyed with other property that would not have been but for the fact of such excessive insurance."

§ 311. Principles of Construction.

This purpose on the part of the legislature was certainly commendable, and supposed to be in the direction of both public morality and public policy. The intention of the law was undoubtedly good. Concerning its wisdom, I withhold an opinion at this time. It may be stated, as a general proposition, that insurance should

⁴ 43 Wis. 449, 7 Ins. Law J. 391.

not become an incentive to wrongdoing. When it stimulates the policy holder to fraud, an injury results to society, as well as to the underwriter. Losses occur in which are involved others besides the insurance company and the insured, as suggested by Judge Cole. Innocent persons may be, and often are, the victims of conflagrations which proceed from the crime or negligence of an owner of buildings who has been tempted to incendiarism or criminal neglect by excessive insurance. The policy of these laws is to protect property, and to offer to society a larger measure of security, at the same time rendering full justice to the insured. But it also contemplates an abridgment of the natural rights of the parties concerned to make contracts, and, with such effects, these laws should be strictly construed. Endlich on the Interpretation of Statutes⁵ says: "It is undoubtedly a reasonable expectation that when a legislature intends the infliction of suffering, or encroachment on natural rights or liberties, on the ground of exemption, powers, or privileges, it will not leave its intention to be gathered by mere doubtful inference, or convey it in cloudy and dark words only." I think the general principle of law is here correctly stated, and that in the construction of a statute like this under discussion the court can never be justified in giving a larger scope to the meaning of words than is warranted by their common use in relation to other matters. In the interpretation of doubtful or ambiguous words in an insurance contract, the rule, undoubtedly, is to construe strictly against the company, and liberally in favor of the insured; but this rule is based on the fact that the language of the contract is that of the insurer, and that, if words have been used that are obscure, their meaning must be explained in such a manner as to best protect the interests of the insured. This very proper rule of interpretation, it will be understood, is inapplicable when the language of a statute is under consideration, and when, as in this instance, its effect is to restrict the right of the insurer to limit its liability by suitable provisions incorporated in the policy. The operation of this law is to benefit the insured, and certainly, as against the insurer, nothing should be added to its terms by construction. So far as I am in-

⁵ Section 329.

formed, the enactment of these valued policy laws has never been asked for by the insurance companies, or been the subject of their secret prayer, or hearts' sincere desire. On the contrary, they have always opposed this class of legislation as inimical to their own interests, to the interests of property, and those of the state. Under the common rules of construction as applied to contracts, therefore, the words of these statutes should not be interpreted against the insurer, as having a larger or broader meaning than they have in their popular and ordinary use. But the mere suggestion that there is anything here to construe implies a want of understanding, for what can be plainer to a person of ordinary intelligence than the two words "wholly destroyed?" There is in their elements nothing qualifying. They mean all. It is true that the word "destroyed" may have two meanings, and does not necessarily signify utter extinction. Combustible things may be burned, and the chemist will tell us that nothing more has resulted than a change of form; that the same thing exists in its original elements, dis-severed and scattered by the action of heat. But this is not what the word means in its ordinary use. Besides, we are dealing here with values, more than with things. The premium paid for the insurance was dollars and cents. . The indemnity promised was that of money, and the question of whether the building insured was wholly destroyed has relation only to values; and I know of no better rule than that suggested by Judge Lyon in the Harri-man Case, *supra*, that when the ruins contain no greater value than the cost of removing it the property is wholly destroyed, within the meaning of the statute.

§ 312. "Wholly Destroyed" Refers to Values Instead of Species.

In the settlement of a loss under an insurance policy, we are treating of values entirely. It is not a horse or a house that has to be restored, although the option is given the company to replace, but the value of the property destroyed, or the actual loss sustained, computed in dollars and cents. Let me illustrate: Coin and plate may be melted into bullion. The coin and the plate have lost their specific character, their identity; still the value has not been es-

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sentially changed. A tree may be blown down by the wind, and its value in no large sense diminished. It has lost its character as a tree, and yet it will be valuable for lumber or wood. Each year thousands of acres of forests are converted into lumber which is used in the construction of homes, barns, factories, and business houses. The forest has lost its identity, and yet its value has been increased. Another illustration more directly in point may be found in water-power mills, where the flume and foundation will sometimes represent fully one-third of the cost of the entire property.

§ 313. That cannot be Wholly Destroyed Which Remains of Great Value.

The superstructure may be wholly destroyed by fire, and yet leave intact, and comparatively uninjured, property of great value. There are business houses in all large cities where the foundations cost large sums of money, and which are seldom seriously injured by fire, although the superstructures become a mass of ruins. The building has lost its "specific character," and yet substantial values remain, which can be utilized in the reconstruction. These pages are being written in one of the modern office buildings of Chicago, of such construction that, if its walls should fall into chaotic piles of débris, its steel and iron framework and its foundations would be worth, under ordinary circumstances, not less than \$250,000. Suppose, then, the owners of this building are insured for its full value, and a fire should happen, by which the exterior walls should fall, leaving only the framework of steel and the foundations before referred to. Under the rulings in the *Oshkosh Packing & Provision Co. Case*, *supra*, the owners of the building would receive its full value, and have property left with which to rebuild, worth over \$250,000. How can such possibilities of gain be reconciled with the purpose of the law in Wisconsin as explained by Judge Cole? Is there not a temptation to burn property that is insured, when an advantage such as is here explained is certain to result?

These views were taken by the St. Louis court of appeals in the case of *Ampleman v. Citizens Ins. Co.*⁶ The court said: "Keeping the nature of the contract in view, it is not obvious how the build-

⁶ 35 Mo. App. 308, 18 Ins. Law J. 393.

ing can be considered to be wholly destroyed as long as any parts thereof which are subject to the action of fire remain standing, and can, without removal, be effectively utilized in its reconstruction, so that such property shall be in as good condition when rebuilt as it was before the fire. The law certainly does not mean that a building is wholly destroyed when its integrity as a structure is gone. Such integrity is equally gone in case of a partial destruction contemplated in the statute. The insurance is only against fire and its incidents." This language expresses the only practical business view of the words "wholly destroyed." By what rule can we determine when a building has lost its identity and specific character? When the roof has burned off, is it still a building? Certainly not habitable, not complete. If it still retains its character and identity with the roof off, how will it be when the tenth, ninth, eighth, and seventh stories are destroyed, and the remaining stories intact, or only having sustained damage? It will be seen that the rule of construction laid down in the Oshkosh case is one involving difficulties in its application, while the other is natural, simple, and just, and the purpose of the statute is carried out, both in spirit and letter.

§ 314. When Building shall Fall, Except as the Result of Fire.

Insurance contracts in general use express certain conditions that are intended primarily to protect the insurer against imposition, misconception, and fraud, and at the same time have another and no less important purpose firmly rooted, in the preservation of public morality and the well-being of society. Of this class of conditions that are frequently presented for consideration may be specially designated those that relate to "fallen buildings," "explosions," "theft," "insurrection and riot." It will be unnecessary to point out in what manner the public is interested in buildings being securely constructed. When the case is otherwise, it will be understood there is danger to life and property. Cheap and showy structures will be built to supply the demand for "palatial" homes and business houses at a low rental, and that the evil is kept within moderately safe bounds is chiefly due to the fact that the cupidity of owners is

restrained by the apprehension of personal loss in the event that these flimsy structures fall in a mass of ruins from other causes than the "result of fire," in which case the insured would not be indemnified. These provisions of insurance policies, it will be seen, therefore serve the public, in the fact that they offer incentives for the construction of better buildings; and the same protective and conserving principle applies in regard to the conditions incorporated into policies, making the insurance a nullity when the fire is caused by "explosion." The effect in this case is to lessen carelessness in the use of explosives, and to prevent taking upon the premises steam boilers that are unsafe. The purpose in either case is to better protect life as well as property, and people who have no other interest in the subject of insurance are often saved from perils that would exist were it not for the fact that the insurance company had placed a check upon the greed of those who would build cheaply, without regard to proper foundations, the quality of work and the selection of material used in the superstructure, who would employ inexperienced engineers, or seek to save money by using boilers improperly made, and from iron or steel not having the strength to afford the required security.

The insurance company has also provided for the peaceful conditions of society by making it for the interest of every property owner not only to be law abiding himself, but to use his best endeavors to uphold the law and enforce police regulations; hence the provision that it will not be liable for theft at or after a fire, nor for loss occasioned by insurrection, riot, or by resistance to the regularly constituted authorities. Capital is conservative, and bases its ventures only upon honest, stable, and peaceful conditions. Its interests, in a large majority of cases, are identical with those of the most permanent forms of society. It is true that sometimes an occasion will be presented when a temporary advantage may be gained by disregarding its duty to morality, and in upholding the civil authorities; but when this occurs, and an injury is done to the public conscience, the subsequent undertakings upon which it enters will be made on a basis involving larger risks, and promising smaller profits. The courts, therefore, have uniformly sustained these conditions referred to of the insurance policy, both because they

tend to assist its officers to enforce the laws and prevent violence and fraud, and for the further reason, too, that they are proper subjects of contract.

§ 315. Proximate Cause.

When the policy provides, as it generally does, that the company shall not be liable "if the building falls, except as the result of fire," it will sometimes happen that difficult questions are presented, in determining whether a loss comes within the provisions of the policy or not. To illustrate, in 1889 an opera house was burned at Duluth. At the time of the fire only a portion of the walls, which were brick, fell. They were much weakened by the fire, and pronounced dangerous by the local authorities, and the owners were required to take them down. While this was being done (on the second day after the fire) one of the walls fell on a small frame building adjacent, which, being crushed, took fire from a heated stove in the ruins. Considerable merchandise was burned, which presumably would have been recovered in a damaged condition, had no fire resulted. The frame building and its contents were insured, and considerable discussion arose as to whether there was any liability under the policies; one side contending that the "wall fell as a result of a fire," the burning of the opera house being the proximate cause of the disaster. On the other hand, it was claimed that the wall would probably not have fallen had its anchorage not been loosened by the attempt to take it down, and that thereby an independent and intervening cause came to exist. This case was settled without being taken into court.

On a careful examination of the authorities, I do not find that the American courts have ever passed upon the legal questions involved, where a similar state of facts was presented, although instances of this kind are by no means infrequent. There is an English case reported where the circumstances were analogous to those at Duluth. The wall did not fall until three days subsequent to the fire, and the court held the insurers were liable.⁷ In another case the walls did not fall until seven days after the fire, and then during the prevalence of a high wind; and it was there held

⁷ Johnston v. Insurance Co., 7 Ct. Sess. Cas. 52.

that the time intervening was so long that the fire could not be regarded as the proximate cause of the loss, and the insurer was discharged.⁸

§ 316. It is the Building That is Insured, not the Material of Which It is Composed.

In *Nave v. Home Mut. Ins. Co.*⁹ a store and warehouse were insured, which fell, either from overloading, or because of some defect in its construction. The policy does not appear to have contained any stipulation relieving the company from loss in the contingency which happened, and the case was considered by the court, applying such general principles of construction and of law as the purpose of the contract and the attending circumstances made appropriate. The court said: "The subject insured had ceased to be such, and became a mere congerie of materials before the fire occurred, and by reason of a cause not insured against in the policy. The maxim, '*Causa proxima non remota spectatur*,' has no application in such a case. If the fire had been the immediate cause of the destruction and loss, then the remote causes of the fire might have been immaterial. The cause of the loss was not the fire, but the fall. That a fire sprung up afterwards in the rubbish, and destroyed the fallen material, was wholly another matter. The material was not insured. The building insured no longer existed as such, and it ceased to exist by reason of a peril not insured against."

In *Wood*¹⁰ the law on this subject is tersely stated as follows: "If, from any cause outside of the peril insured against, as by wind, explosion, earthquake, or by any cause, the building falls in pieces, or so much of it that it ceases to be a building, and afterwards a fire breaks out and destroys the material, the loss is not under the policy." *Lewis v. Springfield Fire Ins. Co.*¹¹ is a case sometimes referred to as opposed to the doctrine here stated, and, while the facts in that case differ in many important respects, there is

⁸ *Gaskarth v. Insurance Co.*, 6 Ins. Law J. 159.

⁹ 37 Mo. 430, 5 Benn. Fire Ins. Cas. 88.

¹⁰ 1 Wood, § 85.

¹¹ *Lewis v. Insurance Co.*, 10 Gray (Mass.) 159, 4 Benn. Fire Ins. Cas. 239.

nothing in the application of the legal principles laid down that is not in substantial accord with the authorities before given. The policy there was on stock contained in a large stone building, about one-half of which fell. No claim was made for the stock in that portion of the store which had fallen, and no particular damage had resulted from the falling of the building to the stock contained in that part which remained standing, but in the rubbish of that portion which had fallen a fire broke out about half an hour afterwards, causing a damage to the otherwise uninjured stock; and the court held that the insurer was liable. The reports do not show that the policy in that suit contained any provisions specially intended to relieve the company from liability "when a building falls" from other cause than fire. In the absence of such special agreement, and no fraud being claimed, it was, of course, immaterial in what manner the fire originated; and as the goods injured by fire and water had sustained no damage by the first disaster, which was the proximate cause of the fire, I fail to find that any contract rights were violated by the decision of the Massachusetts court. It was not a case, under the policy, where any inquiry could be properly made, whether the cause was near or remote, original or subsequent.

Among the later cases reported is that of *Pelican Ins. Co. v. Troy Co-operative Ass'n.*¹² There the evidence tended to show that the building insured fell on account of a high wind, and that the debris immediately took fire and was consumed. The policy provided that the company should not be liable on account of "fire caused by hurricane." The trial court gave judgment for the insured. This was reversed, and the supreme court said: "The policies showed what risk appellant assumed, and what it did not, and there was much evidence tending to show that the loss occurred from causes which would not fix liability on appellant."¹³

In *Huck v. Globe Ins. Co.*¹⁴ the risk consisted of a double brick

¹² 77 Tex. 225, 13 S. W. 980.

¹³ 1 Phillips, 265; *Huck v. Insurance Co.*, 127 Mass. 306, 8 Ins. Law J. 912; *Breuner v. Insurance Co.*, 6 Ins. Law J. 475; *Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom*, 80 Ill. 558; *Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118.

¹⁴ *Huck v. Insurance Co.*, 127 Mass. 306. See note 2.

It was held in *Breuner v. Insurance Co.*, 51 Cal. 101, that a building has
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building and its contents. The two stores were separated by a wall rising from foundation to roof, with openings on each floor, permitting free communication between the two stores. The central supports for the floors in one of these buildings failing, the entire stock contained in each story was precipitated to the basement; making a congerie of merchandise, broken floors and timber, which immediately took fire, and sustained further damage from that cause, and from the water used in extinguishing the fire. The exterior walls and the wall separating the two buildings remained standing. The roof did not fall, and no substantial injury was done to the other half of the building. An action was brought to recover the loss, under a fire insurance policy, and the court held that it could not be maintained.

§ 317. Damage to Party Walls.

The liability of an insurance company to pay a loss is sometimes so problematical as to become the subject of much discussion. Wall damages belong to cases of this kind, and, while the matter in dispute is often too unimportant to justify an appeal to the courts, settlements are negotiated with difficulty, and the results reached are seldom satisfactory to either party. This proceeds mainly from two reasons: First. The injury which the wall has sustained is, in a very large proportion of cases, more a matter of judgment than of mathematics or mechanical art. When a wall has sustained such damage only as affects its appearance, but does not materially impair its strength and utility, there are no rules by which the loss under a policy can be computed. The "chipped" and disfigured wall appeals to no remedial art. Expert knowledge and mechanical science cannot restore its original condition, nor can they estimate definitely its lessened money value. The problems presented are those that relate principally to the æsthetic, and the adjustment is

not "fallen" when three-quarters of it remains standing. So, too, in case of *Security Ins. Co. v. Mette*, 27 Ill. App. 324, where only a part of the building fell, it was construed not to cause a forfeiture. And in *Fireman's Fund Ins. Co. v. Congregation Rodeph Shalom*, 80 Ill. 558, it was the opinion of the court that, to be "fallen," it must have ceased to be a building,—that is, lost its identity and character as such.

frequently contentious, and the settlement, more frequently than otherwise, a compromise. Second. There is an uncertainty in regard to where the insurer's liability begins and ends. A. and B. own adjoining lots, and decide to build each a three-story brick store. Consulting economy in the occupation of the ground appropriated for this purpose, and the cost of their undertakings, they conclude to build a 12-inch party wall, one-half of which will rest upon the land owned by each. When the structures are completed, B. insures, and his policy is written to cover "on his three-story brick building." Subsequently A.'s store is burned, and becomes a total loss, except the party wall. This, so far as B.'s building is concerned, remains intact and without cracks; but on the side exposed to the fire (that is, A.'s wall) the brick is badly burned and checked, the wall weakened and disfigured. B. claims a loss under his policy. Here is presented a case of frequent occurrence, and the rights of the respective parties under the contract of insurance are often the subject of protracted, and sometimes bitter, contention. But few questions are met in the settlement of fire losses that are less understood, or that are finally disposed of in a less satisfactory manner. A careful examination of such a claim will disclose that there are, however, no insurmountable difficulties involved. It may be admitted that B. has sustained a loss by the fire, in the fact that his own brick wall has been deprived of the lateral support of that part of the wall owned by A. So, too, he may have been a creditor of A., and finds his security impaired or lost on account of A.'s insolvency, which may arise from the destruction of the building. In neither case is the loss chargeable to the insurer. The situation of B. may be unfortunate in the extreme, but it is one wholly outside of the terms of his insurance contract, and might have been provided against by the construction of a more substantial wall in the first instance. It will not be disputed that B. has an interest in A.'s wall that could be protected by insurance, but this is not effectuated by the form of policy mentioned. Wherever there is a tangible and computable interest, it is a proper subject of insurance, unless its protection is in violation of law, or repugnant to public morality. "Rents" and "use and occupation" belong to this class of insurance, but neither is secured by a policy covering on building. In the case supposed, A. and B. each own that part of the wall standing on his

own land, and each has given and received a cross easement of that part of the wall belonging to the other. In the destruction by fire, therefore, of A.'s building, B. cannot claim a loss, for it was not his property. He was not the "sole and unconditional owner." Each had a right to enjoy the support which was given to his own part of the wall by that portion owned by the other; that and nothing more. Before A.'s building was burned, had he desired to take down his portion of this party wall for the purpose of laying better foundations for a higher and more substantial structure, his right to do so could not have been successfully contested.

There is reported an analogous case in Ohio,—*Hieatt v. Morris*.¹⁵ There the declaration set forth that T. and H. owned adjoining property in the city of Cincinnati, between whose buildings a party wall had stood for twenty-one years; and the grantee of H., desiring to erect upon his lot a building suited to its increased value, notified the plaintiff of his intention to pull down his half of the partition wall; and, upon the plaintiff refusing, the defendant took down the wall, using due care. But the plaintiff's wall fell, and it was held that the fact did not constitute a good cause of action. This decision fully recognizes the correctness of the proposition here stated,—that each party owns his wall, and, in absence of any express agreement to the contrary, may take it down for the purpose of building a different wall, something adapted to a larger building, using due care to protect the property of the adjoining premises, and this may be done without the consent of the person owning the other half of the wall. In *Reynolds v. Fargo* ¹⁶ it was held that, in the absence of any covenant to the contrary, neither party is bound to rebuild a party wall which has been torn down as a measure of safety. There is undoubtedly a conflict of opinion in regard to what the law is in respect to the liabilities of the owners of a party wall to keep the same in repair. In *Matts v. Hawkins* ¹⁷ it was held that, when the wall is owned in severalty, each of the owners may bring an action for injuries done to his half. This decision did not involve any right or obligation of insurers. The question in contention was in regard to the duties of the owners of the wall towards each other.

¹⁵ 10 Ohio St. 523.¹⁶ 1 Sheld. (N. Y.) 531.¹⁷ 5 Taunt. 20.

In *Campbell v. Mesier*¹⁸ the question arose before Chancellor Kent, in a case where the plaintiff had pulled down a party wall which had become unsuitable. He had given notice to the other owner, but the latter refused to consent, and requested him, expressly, not to remove the wall. The evidence showed the wall to be in a ruinous condition. The chancellor ordered the defendant, the owner of the adjacent estate, to contribute an equal share towards the reconstruction of the wall. This case is fully in support of the proposition that if a party wall require repairing or rebuilding, in the estimation of experts, one party can compel the other to contribute a ratable proportion of the cost thereof. From a careful examination of the authorities, I do not find anywhere a recognition of joint ownership in a party wall built like the one in the hypothetical case, but that the proprietary interest of each party extends only to the center of the wall, and any right acquired in regard to the use of the other half is in the nature of an easement.

¹⁸ 4 Johns. Ch. 334; 3 Kent, Comm. 438.

CHAPTER XVIII.**INCREASE OF HAZARD.**

- § 318. The Acceptance of the Risk and Premium Paid is Based on Existing Conditions, Affecting the Hazard.
319. Many Kinds of Property are Insured in Reference to Their Uses.
320. That Which is Indispensable to the Ordinary Use and Enjoyment of the Property will be Presumed to have been Consented to, unless Specially Prohibited.
321. What Constitutes an Increase of Hazard will Usually be a Question for the Jury.
322. Testimony of Experts Competent to Show an Increase of Hazard.
323. Conclusions.

§ 318. The Acceptance of the Risk and Payment of the Premium are Based on the Existing Conditions Affecting the Hazard.

When the policy stipulates that during the term of the insurance the status of the risk must not be changed in such a manner as to "increase the hazard," such stipulation will be given by the courts a reasonable construction. The parties have contracted in respect to particular conditions, and if these are changed to the prejudice of the insurer without its consent, there will continue no duty on its part to respond in case of loss.¹ It will seldom occur that the circumstances of a risk are permanently fixed.

¹ Long v. Beeber, 106 Pa. St. 466, 14 Ins. Law J. 622.

The tenant of the insured employed a steam-power machine for threshing grain on the premises. This was done without the knowledge of either the insurer or insured, and in violation of the conditions of the policy. The Pennsylvania court said: "It is a very plain proposition, and one that ordinarily will not be disputed, that where a man makes an agreement with another he should himself comply with its terms and conditions, if he would insist upon a compliance on the part of him with whom he has contracted. * * * When a condition in a policy is unambiguous, the insured cannot avoid a compliance with its terms by showing an honest, though unsuccessful, effort to comply therewith. In the case in hand there can be no doubt that the condition upon the breach of which the defense was rested was both

§ 319. Many Kinds of Property are Insured in Reference to Their Uses.

Perishable property will always be subject to changes incident to situation and character. Many of these are well understood, and will be presumed to have been within the contemplation of the parties when the contract to insure was entered into. A person at midsummer, when there are no fires on the premises, may insure his dwelling, and, although he consents to a forfeiture under the terms of the policy if during the period of insurance the circumstances of the property are so changed as to "increase the hazard," may nevertheless, on the approach of winter, or at any other time, actually increase the hazard by resorting to some approved method of warming the building. At the inception of the risk the temperature was such that artificial heat was not required, but this status was not warranted. Both the insurer and the insured understood that the usual occupation of the premises would make changes inevitable. Incident to the ordinary use of a dwelling is heating, with its attendant dangers. This will be presumed to have been understood, and the implied consent of the insurer given to such "increase of hazard" as would be made necessary to secure a proper temperature by such agencies as were common and prudent. The execution of any extraordinary purpose in regard to the property insured, or the employment of unusual agencies, would, of course, be excluded from the implied agreement. If, therefore, the owner of the dwelling mentioned should adopt some method of heating that was essentially different from that in general use, consent of the insurer would not be presumed, and it would be a question for the jury whether the plan for heating adopted caused an "increase of hazard"; that is, whether the risk of fire was greater than would have been the case if the premises had been heated in the usual way.²

The principle here applicable to the interpretation of this class reasonable and unambiguous. The company, for a fixed price, insured the building as it was at the date of the policy; it took upon itself that risk, and none other." And it was held, too, that the legal effect was the same whether the increase of hazard was temporary or permanent.

² Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co., 5 Ohio St. 450.

The undertaking to insure is based upon the ordinary conditions incident
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of contracts is not difficult to understand, and may be found well illustrated in *First Congregational Church of Rockland v. Holyoke*

to that class of hazards. If new methods are introduced, it will be a question for the jury, under appropriate instructions, whether the hazard has been increased.

In *Houghton v. Insurance Co.*, 8 Metc. (Mass.) 114, it was held that the status of the risk must be substantially preserved; that the parties had contracted in reference to conditions existing at the inception of the insurance; and that any material changes, whereby the hazard was increased, would cause a forfeiture. *Dodge Co. Mut. Ins. Co. v. Rogers*, 12 Wis. 337; *Mayor, etc., of City of New York v. Exchange Fire Ins. Co.*, 9 Bosw. (N. Y.) 424; *Dittner v. Insurance Co.*, 23 La. Ann. 458; *Williams v. Insurance Co.*, 57 N. Y. 274; *Hoffecker v. Insurance Co.*, 5 Houst. (Del.) 101.

In the case last mentioned, on page 118, the court said: "If they did so increase the risk, they are not entitled to recover, for the law on that subject was very plain and well settled in this state, as elsewhere in the states of this country and in England. That law declares that in every contract or policy of insurance against fire there is an implied promise or undertaking on the part of the insured that he will not, after the making of the policy, alter or change the premises, or alter or change the kind or character of business carried on or to be carried on there, so as to increase the hazard of loss by fire."

There was a change in the use or occupation of the adjoining premises, which increased the risk, and of which the insured gave no notice, as he had stipulated to do in the policy. The insurer was discharged. *Lebanon Mut. Fire Ins. Co. v. Hankinson* (Pa. Sup.) 3 Atl. 672; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

To create a forfeiture, it is not essential that the act complained of as increasing the hazard should have been the cause of loss. *Martin v. Insurance Co.*, 85 Iowa, 643, 52 N. W. 534. In *Turnbull v. Insurance Co.* (Md.) 34 Atl. 875, the Maryland court said: "At the trial of the case below four exceptions were taken by the plaintiff. The first and third exceptions relate to the refusal of the court to allow the plaintiff to offer evidence tending to prove that the fire which destroyed the building 'was not started or caused by the use of gasoline.' This testimony was clearly inadmissible, because it was not relevant to any issue made by the pleadings, or which could have been properly framed in a suit on the policy which is the subject-matter of this controversy. The condition of the policy was that it should be void if, among other things, gasoline was kept, used, or allowed on the insured premises, and the question was whether there had been any violation of this condition on the part of the insured. The cause of the fire was not in any way involved, and, as such testimony was calculated to mislead the jury, it was properly rejected. *Howell v. Society*, 16 Md. 386, 387; 1 May, Ins. § 220; *Pars. Mar. Ins.* 505; *Kyte v. Assurance Co.*, 149 Mass. 123, 21 N. E. 361."

Mut. Fire Ins. Co.³ Among other things, the policy provided against an increase of hazard. The property insured was a frame church building, and it was in evidence that during the term of the policy, by the consent of the trustees, an attempt was made to remove the outside paint by means of a naphtha torch, and thus by carelessness of the workmen, or from accidental cause, the building was burned. The court said: "The making of ordinary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of an article whose use in a business carried on in the building is prohibited by the policy. In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like these we are considering should not be deemed to apply to an increase of risk, or to the use of an article necessary for the preservation of the property. * * * The question for the jury was whether the defendant, if familiar with the conditions of the building and the methods usually adopted in making repairs, should have contemplated, when they issued the policy, that the plaintiff corporation (the church) would burn off the paint at such a time and in such a way as it did." Here we have a concise statement of the only important question which the issues presented. The fact that the property burned while the violative act complained of was in execution, and which clearly involved the cause of the disaster, leaves no room to doubt but that the hazard had been increased, and there is only left to determine whether the express stipulation against any change in the status of the risk had been in any way qualified by the presumed consent to perform whatever might be incidental and necessary to ordinary use and occupation; in other words, may it be reasonably supposed that the particular act here pleaded in defense was within the contemplation of the insured and insurer when the agreement was reached as to the terms of the policy? It will not be understood that, when entering into this contract, the minds of the parties interested were actively regarding any particular agencies existing, or possible to exist, that would increase the hazard; nor will it be supposed that either the insured or insurer at that time consciously decided or formed any judgment as to the character of such agencies.

³ 158 Mass. 475, 33 N. E. 572.

§ 320. That which is Indispensable to the Ordinary Use and Enjoyment of the Property will be Presumed to have been Consented to, unless Specially Prohibited.

When, therefore, it is said that the parties are presumed to have contemplated such uses or changes, it is not meant that they had in mind specific facts or purposes. The understanding referred to is that of customs, the convenience and necessities of trades and professions, the demands of fashion, and the comforts of home. That which contemporaneous and subsequent events demonstrate is needed for adaptation and conformity to such ordinary, understood uses, such conveniences and comforts as are generally sought for, the law will presume was consented to, and that only.

It is not important to consider whether the insurer would or would not have issued its policy had it known that this particular change in the risk would be made. In construing a contract, we are alone concerned with what the parties actually did, or may have reasonably contemplated.

In *Willow Grove Creamery Co. of Washington Co. v. Planters' Mut. Ins. Co.*⁴ there had been a change in the location of smokestack, without notice and consent, and contrary to an express stipulation of the policy that nothing should be done to increase the hazard. At the trial, plaintiff sought to show by competent testimony that other property of the same class had been insured by defendant company at about the same time the policy in suit was issued, and that no greater rate was charged on account of the particular arrangements and location of smokestack. This was not permitted. The court said: "The question to determine was whether the change of the smokestack, as shown by the proof, had increased the risk or hazard from what it was under the original contract; and that it was not at all material, for this consideration, to show whether the appellee had made a different contract with some one else or not. It was not competent to vary the contract between the appellant and appellee by showing that the insurance company had made an entirely different contract with others. The material inquiry was

⁴ 77 Md. 532, 26 Atl. 1024.

whether the appellant had violated its contract, and thereby rendered his policy null and void."

The case of *Mack v. Rochester German Ins. Co.*⁵ has become a leading authority where the question for consideration arises on change of hazard. It was a condition of the policy in that suit that it should become void if the risk be increased by any means within the control of the assured, without consent of the company indorsed thereon, and it was shown by undisputed evidence that several mechanics were employed about the building insured, making such considerable changes as were necessary on account of particular uses to which the premises were to be applied. The trial court directed a verdict for defendant. The general term was of the opinion that this was error; that the making of necessary repairs, to preserve normal conditions of the property, would not violate the terms of the policy; and that the evidence, therefore, presented a question for the jury; but the court of appeals thought otherwise. Ruger, C. J., said: "Certain conditions are very generally regarded by underwriters as largely increasing the hazards of insurance, and they, unless corresponding premiums are paid for the extra risk, are usually intended to be excluded from the obligations of the policy. Such are the conditions in reference to unoccupied houses, changes in the occupation from one kind to another more hazardous, the use of inflammable substances in buildings, and their occupation by carpenters, roofers, etc., for the purpose of making changes and alterations. Those conditions, when plainly expressed in the policy, are binding upon the parties, and should be enforced by the courts, if the evidence brings the case clearly within their meaning and intent. It tends to bring the law itself into disrepute when, by astute and subtle distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable, material obligation of the contract." The court then reviews the evidence, and, after expressing distinctly its opinion that the conditions of the policy had been violated, added: "In case there had been a submission of the facts to the jury, and it had found that carpenters were not engaged in making alterations of this building, within the meaning of the policy, it would have been the clear duty of the court to set aside the verdict. Courts are under no obligation to yield their assent to verdicts which deny

⁵ 106 N. Y. 560, 13 N. E. 343.

signification of language, or violate the plain meaning and intent of an unambiguous contract.”⁶

In Iowa it was held that the execution of a chattel mortgage on the property insured increased the risk.⁷

In *Kyte v. Commercial Union Assur. Co.*⁸ the policy provided for forfeiture in case the premises should be used in such a manner as to increase the risk. Afterwards the building insured was occupied for the illegal sale of intoxicating liquors, and it was held that by such occupation there had been an increase of the hazard, and that the policy had become void, and that there could be no recovery, notwithstanding the illegal use of the premises had terminated before the fire. The court said: “We think an increase of risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured, by his voluntary act, increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid.”

§ 321. What Constitutes an Increase of Hazard will Usually be a Question for the Jury.

The question of what is an increase of hazard will in most cases be for the jury, under proper instructions from the court. The jury will find the facts, but more frequently than otherwise it will be a question of law whether such facts, within the meaning of the policy, constitute an increase of hazard. The ultimate decision as to what the parties contemplated and permitted in respect to possible changes in the situation and incidents of the risk during the life of the policy involves a construction of its terms, and this is always the duty of the court, and never the privilege of a jury.⁹

⁶ *Id.*

⁷ *Lee v. Insurance Co.*, 79 Iowa, 379, 44 N. W. 683.

⁸ 149 Mass. 116, 21 N. E. 361. See, also, *Lyman v. Insurance Co.*, 14 Allen (Mass.) 329; *Mead v. Insurance Co.*, 7 N. Y. 530.

⁹ *Lee v. Insurance Co.*, 79 Iowa, 379, 44 N. W. 683. It was held, as a matter of law, that a chattel mortgage increased the hazard. And in *Davis v. Insurance Co.*, 81 Iowa, 496, 46 N. W. 1073, it was held that the operating of a corn-shelling machine on premises adjoining the insured property was a change of exposure, within the knowledge and control of the insured.

The case of *Francis v. Insurance Co.*, 25 N. J. Law, 78, both supports and

To illustrate, we will suppose that Brown insures his one-story frame building, now occupied as a grain warehouse. Two months later, but during the term of the insurance, without notice to the company that issued the policy, he converts the grain warehouse into a steam-power planing mill. The property subsequently burns, and the insurer denies liability, on the ground that, without its consent and the payment of additional premium, the hazard has been changed, and the risk increased. Suit is brought to recover, and at the trial the facts here stated are shown by undisputed testimony. It will, of course, be the plain duty of the court to instruct the jury to find for the defendant; in other words, the court must hold, as a matter of law, that the changing of a grain warehouse into a steam-power planing mill is an increase of the hazard, and the obvious reason is that in the determination of the matter is in-

illustrates the text. Near the property insured there had been erected an exposing building, in which was placed a quantity of hay. The property burned, and the insurer refused payment, on the ground that the risk had been increased. The question was submitted to a jury, who found for the plaintiff. This verdict was set aside, and the court said: "Is it not clear that the risk was increased? In the first place, as we have seen, hay was specified in the policy as a hazardous article. In the second place, the rates of insurance fixed by the company, as specified on the policy, was some thirty or forty per cent. higher on barns and stables, buildings in which hay is usually kept, than on dwellings and stores. In the third place, the premises were situated in the manufacturing village of Raritan, where a building with hay in it would probably be more dangerous than in the country. And in the fourth place, the fire actually originated in the building. Now, I think any man would feel that the erecting of a shed adjacent to his house or store in such location, and putting hay in it, endangered his property. Every man would feel that in so doing he increased the risk of fire. No prudent man, no man who acted with proper consideration and caution, would expose himself to such hazard if he could avoid it. The result shows the imprudence of the plaintiff's conduct. The fire occurred at the dangerous point. The spirit of the condition in the policy was violated, and the loss was the consequence. I am willing to go as far as any well-considered case has gone in construing these contracts of insurance favorably for the insured. But insurance companies ought to be protected from every reckless and careless disregard of their contracts on the part of the insured; and I am constrained to say that, in my opinion, the verdict in this case should be set aside." *Cornish v. Insurance Co.*, 74 N. Y. 295, 298; *White v. Insurance Co.*, 83 Me. 279, 22 Atl. 167.

volved a construction of the contract. In form the question may be referred to the jury; in fact it must be decided by the court, who alone is capable of making the careful analysis of language, and of giving to words their proper legal effect.¹⁰

§ 322. Testimony of Experts Competent to Show an Increase of Hazard.

Expert testimony may be called on the issue of an increased hazard. It is competent for the underwriter, testifying as an expert, to state that the rate of insurance will be greater or less, as the circumstances of the risk are affected by the alleged changes.

¹⁰ *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379; *Daniels v. Insurance Co.*, 48 Conn. 105; *Appleby v. Insurance Co.*, 54 N. Y. 260.

In this case the facts show that after the beginning of the risk, without the consent of the insurer, the premises were occupied for chair finishing, which imported the use and keeping of paints and varnish. The court held an increase of hazard, and directed a verdict. It was objected that the question should have been submitted to the jury. The court replied: "As much as we venerate and respect the right of trial by jury, we are of the opinion that the judges of the courts, while they may be supposed to have more learning in the law, are still able to comprehend an undisputed state of facts with as much intelligence as any jury that can ordinarily be impaneled." *School Dist. No. 116 of Minnehaha Co. v. German Ins. Co. of Freeport (S. D.)* 64 N. W. 527.

In *Appleby v. Insurance Co.*, 54 N. Y. 253, it was said: "As an ordinary rule, it may be safely assumed that upon an undisputed state of facts, the court in which an action is pending may render judgment which the law requires, without the aid or advice of a jury, and that such action by the court does not violate any of the maxims of the law." *Reid v. Insurance Co.*, 11 U. C. Q. B. 345. It was held that, as a matter of form, the question of increase of hazard must be submitted to the jury, but that under the facts proved the policy was clearly avoided.

In *Pottsville Mut. Fire Ins. Co. v. Horan*, 89 Pa. St. 438, 10 Ins. Law J. 771, we find that when the policy was issued the insured building was on one side detached from a frame range of several buildings by a vacant space of 26 feet. Subsequently the insured built on this unoccupied lot, which made a continuous row. The insured property burned during the term of policy, and the fire originated in the new house. The court held that the fact of an increase of risk was too evident to require proof, and that the policy was avoided.

The supreme court of the United States said, in deciding *McLanahan v. Universal Ins. Co.*:¹¹ "The ultimate fact itself, which is the test of materiality,—that is, whether the risk be increased so as to enhance the premium,—is in many cases an inquiry dependent upon the judgment of underwriters, and others, who are conversant with the subject of insurance." If the change in the conditions of the risk is such a one as, in the opinion of the underwriter, requires a larger rate of premium, it signifies to the mind familiar with the rules of business that the risk has been increased.¹²

§ 323. Conclusions.

The promise to pay a loss is based on the payment of a premium, which is computed in reference to the existing conditions and circumstances of the risk. It will therefore be in violation of the implied agreement of the parties for the insured to change the risk during the term of the policy, so as to make the property less secure, without the consent of the insurer and the payment of an additional premium.

The insurance of any particular property, in the absence of special stipulation in regard to its uses, imports the understanding between the insured and insurer that the former will be permitted the ordinary occupation, and that whatever may be necessary, usual, and customary for such enjoyment is not forbidden. All trades, arts, and occupations will be presumed to have been considered in respect to

¹¹ 1 Pet. 171, 188.

¹² In *Hobby v. Dana*, 17 Barb. (N. Y.) 111, the insurance covered on the contents of a "tavern barn." Some time after the commencement of the risk, the insured rented a part of the barn, to be occupied as a livery stable, and this use and occupation continued until the fire. The defendant claimed that there had been an increase of the risk, and the matter was given to referees, who reported that the livery stable occupation had not materially increased the hazard. There was evidence given before the referees by three insurance agents that the changed use of the barn increased the rate of premium one-half of one per cent. The referees' report was set aside, the court holding it was error for them to report that the livery stable occupation was not a material increase of the risk. See, also, *Harris v. Insurance Co.*, 4 Ohio St. 285; *Hervey v. Insurance Co.*, 11 U. C. C. P. 394.

their special needs, and that no restrictions have been imposed upon the customary uses of the property, unless distinctly expressed.

The relations existing between the insurer and insured are artificial, and created wholly by the contract. Until such relations come to exist by the agreement of the parties, there will be no duty which one will owe to the other. The obligations are purely contractual, and, when the agreements of the parties are distinct and clearly expressed in the policy, nothing may be added and nothing may be taken therefrom.

It is competent for the insurer and the insured to either enlarge or restrict the ordinary and customary uses of the property insured. Special stipulations may include extraordinary appliances for extinguishing fires, may regulate the hours for operating factories, and prohibit the using or keeping of explosive or dangerously combustible substances.

When the parties, who are alone interested in the making and performing of these contracts, have fixed by definite agreement in what manner the risk shall be occupied, and to what extent inflammable and explosive substances shall be permitted or prohibited, nothing can be presumed on account of customary uses. The arbitrary regulations which the parties have created by their agreements must control.

The question of what constitutes an increase of the hazard, within the meaning of the policy, is one largely of construction, and must be decided by the court. The jury may find facts, but cannot construe contracts, which is wholly a matter of law. When the facts are in dispute, it will be the duty of the jury to determine what they are; when the facts are undisputed, the question of whether the risk has been increased will be for the court.

CHAPTER XIX.

EXPLOSIONS AND EXPLOSIVES.

- § 324. Insurance against Loss by Fire does not Include Loss from Explosion.
- 325. When Fire is the Proximate Cause of the Loss, the Insurer is Liable.
- 326. A Fire Insurance Policy does not Cover Loss by Lightning, unless by Special Agreement.
- 327. The Keeping or Storing of Explosives, When Prohibited, will Avoid the Policy.
- 328. When the Policy is Silent in Regard to Keeping Explosives.
- 329. Customary Use.
- 330. Conditions must be Performed.
- 331. When Insured is Responsible for the Acts of his Tenants.
- 332. Immaterial Whether or not the Prohibited Articles Caused the Fire.
- 333. Conclusions.

§ 324. Insurance against Loss by Fire does not Include Loss Occasioned from Explosion.

When a policy is to insure against loss by fire, no liability will be created on account of damage occasioned by explosion, and this will be the case even though the policy contains no special provision on the subject. The hazard assumed no more includes a loss or damage from that cause than it would from a tornado or earthquake. It is true that explosions are often the result of sudden and rapid combustion, and in that narrow, technical sense the loss resulting may be by fire. But courts will not presume, when construing contracts, that the parties, in stating their obligations, have used words in their technical or scientific meaning. They will neither enlarge nor restrict the significance which is given to them (whether alone or in combination) in their ordinary and popular use.¹ Explosions frequently lead to conflagrations. When that

¹ The building insured sustained an unimportant damage from the explosion of some unknown substance, apparently caused by a lighted fuse placed in the doorway. The doorsill was broken, and, besides, there was injury to the windows and a slight discoloration of the paint. There was no evidence of the existence of fire, either before or after the explosion. The court said: "The contention that fire, in the shape of a lighted match, brought in contact

occurs, the insurer will be held for the loss by fire only, if the policy so provides. The ascertainment of this liability is generally a task of great difficulty, and sometimes it is found to be impossible. When a fire immediately follows an explosion, seldom are opportunities found to compute the value of the property insured at the moment the process of combustion began. If a building, it may have been rent and shattered, and, while a hasty observation may disclose some parts not broken and demolished, or even apparently uninjured, there will be no reliable data in regard to its actual condition during the brief interval between the explosion and the fire. Under these circumstances, such estimates of value only are possible as will create doubt and contention. Realizing the difficulties presented in this class of adjustments, insurance companies have in some instances so framed their policies as to terminate their obligation at the instant an explosion occurs. The general form, however, of the stipulation in respect to this subject is that "the company shall not be liable for explosions unless fire ensues, and then only for such loss as shall be occasioned by fire."

An exhaustive discussion of this question will be found in the case of *Insurance Co. v. Tweed*.² The explosion took place in a warehouse remote from the property covered by the policy in suit, throwing down the walls of the building where it occurred, and scattering fire to inflammable material across the street, which resulted in a general conflagration, involving several blocks in the disaster, including the warehouse and the cotton therein which was the subject of the litigation. The fire, starting first at the place of the explosion, was not communicated directly to the warehouse containing the cotton insured, but reached that point in the progress of the conflagration from the third or fourth building which took fire. The court held that, as the fire originated from explosion with the explosive, was the cause of the injury, is equally without foundation, in the light of reason and of the authorities. In such case the fire may be the first cause in the train of causes, and that might receive attention among some philosophers, and in some departments of thought; but the law is more practical, and for that reason attributes injuries to proximate, and not to remote, causes." *Phoenix Ins. Co. v. Greer*, 61 Ark. 509, 33 S. W. 840; *Heuer v. Insurance Co.*, 144 Ill. 393, 33 N. E. 411; *Id.*, 151 Ill. 331, 37 N. E. 873.

² 7 Wall. 44.

sion, and communicated to the property insured without any independent, intervening cause, the insurer was not liable.³ The policy in that suit was conditioned that, "on the happening of an explosion, it should become null and void."

§ 325. When Fire is the Proximate Cause of the Loss, the Insurer is Liable.

Among the early cases reported is that of *Millaudon v. New Orleans Ins. Co.*⁴ The property insured was damaged or destroyed by the bursting of a steam boiler. Nothing was burned, and the court, deciding that the insurer was not liable for the loss, said "that, while steam was being extensively used as a motive power in manufacturing both in this country and in England, it was quite remarkable that no cases could be found in which recovery had been had on a fire policy for a loss by explosion." The court clearly intimates as its inferential conclusion that a fire and an explosion risk are inherently different. The first agency in point of time, and not that nearest to the destruction of property, will be considered; but that first agency must be an efficient cause of the loss. A lighted cigar brought into contact with powder or an inflammable gas will produce an explosion, but the unlucky, mischievous spark, liberating the latent forces contained in the powder or the gas, will not be regarded by the courts as the proximate cause. Any loss under such circumstances, if no fire ensues, will be chargeable to the explosion, and not to the lighted cigar. When, however, it is shown that a fire exists on the premises, or adjacent thereto, and in its progress communicates with flour dust, powder, or other highly inflammable substances, causing an explosion from which loss results, the fire will be held to be the proximate and efficient cause, and the explosion only an incident.⁵

³ *Everett v. Assurance Co.*, 19 C. B. (N. S.) 126.

⁴ 4 La. Ann. 15, 3 Benn. Fire Ins. Cas. 4.

⁵ *Washburn v. Western Ins. Co.*, Fed. Cas. No. 17,216, 9 Ins. Law J. 424; *Washburn v. Artisan's Ins. Co.*, Fed. Cas. No. 17,212, 9 Ins. Law J. 68; *Greenwald v. Insurance Co.*, 3 Phila. 323; *Smiley v. Insurance Co.*, 14 W. Va. 33; *Washburn v. Miami Valley Ins. Co.*, 2 Flip. 664, 2 Fed. 633, and 9 Ins. Law J. 761.

§ 326. A Fire Insurance Policy does not Cover Loss by Lightning, unless by Special Agreement.

A promise to indemnify against loss by fire will raise no obligation when the property is injured or destroyed by lightning, if ignition has not taken place.⁶ While electricity is still very much of a mystery, even to those who have made it the study of a lifetime, no one has yet shown that it is fire. The fact that its presence and movements in the clouds sometimes produce light, or even heat, proves nothing. The fast-revolving air in the funnel of a cyclone is frequently attended with similar appearances. Flashes of light are among the most common incidents of the tornado. This feature of the phenomenon is presumably the result of friction, and, unless the intensity of this force is carried to the point where actual combustion takes place, there will be no liability under a policy insuring only against loss by fire. Caloric is elemental and latent in all substances, and in the impact caused by electrical currents, the circling winds, and in the friction generated in the rapid movement of machinery, this elemental and latent power may be, and often is, developed in a degree of heat where its contact with combustible substances produces fire, and then, and not until then, is the fire insurer an interested party. In a Louisiana case,⁷ on the premises insured, a fire following an explosion, and caused thereby, was apparently extinguished, but broke out again nearly two days later, and without any new and independent cause assignable. The court held that the damage done by the last fire was the result of the explosion, and, as the policy provided that the company should not be responsible for loss occasioned by explosion, there was no liability. The case of *Waldeck v. Springfield Fire & Marine Ins. Co.*⁸ is closely analogous. The building insured was partly wrecked by the explosion of a steam boiler, and in the débris a fire broke out 40 minutes afterwards. The Wisconsin supreme court held that the explosion was the proximate cause of loss, and that the company was discharged. I find an interesting and instructive dis-

⁶ *Babcock v. Insurance Co.*, 6 Barb. (N. Y.) 637, affirmed 4 N. Y. 326; *Keniston v. Insurance Co.*, 14 N. H. 341.

⁷ *Tanneret v. Insurance Co.*, 34 La. Ann. 249.

⁸ 56 Wis. 96, 14 N. W. 1, and 12 Ins. Law. J. 177.

cussion of the legal principles here under consideration in the case of *St. John v. American Mut. Fire & Marine Ins. Co.*⁹ The damage was caused by the explosion of a steam boiler. There were opinions filed by six judges of the New York court of appeals, and it was held that the parties were competent to contract in the manner they did, and that the insurer was not liable for the loss.¹⁰

In *Commercial Ins. Co. v. Robinson*,¹¹ the policy provided that the company should not be liable "for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind." The loss for which suit was brought to recover was caused by fire which was the immediate result of an explosion. It was claimed by the company that the legal effect of the stipulation here quoted was to relieve it from payment of the loss, but the court held otherwise, and appears to have based its conclusions mainly on the fact that the policy stipulation did not expressly provide that there should be no liability except in case fire ensued. The court said: "It secures exemption from liability for losses caused by explosions, but not from liability for losses by fire caused by explosions."

The reasoning and conclusions of the court in this case were quoted approvingly and adopted by the supreme court of Pennsylvania in *Heffron v. Kittanning Ins. Co.*¹²

Policies insuring against loss or damage by fire will generally cover losses that result from explosion, unless the latter is expressly excepted from the hazard assumed.¹³

Explosions, in most cases, proceed primarily from fire, and in their ordinary development present no more noticeable feature than that of rapid combustion. Fire is generally the cause, and the sudden

⁹ 3 Benn. Fire Ins. Cas. 760, 1 Duer, 371, and 11 N. Y. 516.

¹⁰ The following authorities have been examined: *Transatlantic Fire Ins. Co. of Hamburg v. Dorsey*, 56 Md. 70; *Dows v. Insurance Co.*, 127 Mass. 346; *Washburn v. Insurance Co.*, 2 Flip. 664, 2 Fed. 633; *Hobbs v. Assurance Co.*, 12 Can. Sup. Ct. 631; *Smiley v. Insurance Co.*, 14 W. Va. 33.

¹¹ 64 Ill. 265.

¹² 132 Pa. St. 580, 20 Atl. 698.

¹³ *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Renshaw v. Insurance Co.*, 33 Mo. App. 394.

When the building was blown up to prevent the spreading of a conflagration in progress, held, that the insurer was liable. *Greenwald v. Insurance Co.*, 3 Phila. 323.

generating of violent and uncontrollable energy is the result. The breaking and rending apart may be properly regarded as only an effect, or, rather, an incident, of the combustion. When property insured against fire is destroyed in this manner, the insurer will be liable, if the policy contains no stipulation expressly excepting explosions from the risk.

This question was presented and discussed in *Renshaw v. Missouri State Mut. Fire & Marine Ins. Co.*¹⁴ The loss there resulted from an explosion of gasoline, which wholly wrecked the building insured, and the débris afterwards was consumed by fire. As the defendant's policy contained no clause excepting it from loss by explosion, the court held that it was one for which it was liable. It said: "If fire was the direct and proximate cause of the damage, the responsibility therefor becomes fixed. It would make no difference whether it manifested itself in combustion or explosion. * * * The explosion of a coal-oil lamp, caused by the generating of gas, may not in a moment communicate the fire to the entire building, but it may result in as complete destruction as the ignition of gas, which permeates every part of the building, and destroys the whole by an instantaneous blaze. Powder may be ignited either in quantities only sufficient to communicate fire to combustible materials around it, or sufficient to demolish the largest building. There would be only a difference in degree between the one and the other. No reason can be seen why an exception to an indemnity against loss by fire should be made because the work of destruction is instantaneous and by explosion, rather than through the slow process of gradual communication and combustion."

This doctrine is apparently well sustained by the authorities. Among others, particular attention is called to *Scripture v. Lowell Mut. Fire Ins. Co.*¹⁵ In that case a lighted match was applied to a keg of powder, which resulted in an explosion of great force, throwing off the roof, and otherwise injuring the building. The insurer was held for the loss, there being no stipulation in the policy expressly saving the company from liability when the loss was occasioned by explosion.

See, also, *Waters v. Merchants' Louisville Ins. Co.*,¹⁶ where the

¹⁴ 103 Mo. 595, 15 S. W. 945. ¹⁵ 10 Cush. (Mass.) 357. ¹⁶ 11 Pet. 213.

insurance was against loss by fire, and no reference made to explosion. The claim was for a boat destroyed by gunpowder igniting. Justice Story, in delivering the opinion of the court, said: "Some suggestion was made at the bar whether the explosion, as stated in the pleas, was a loss by fire or explosion merely. We are of the opinion that, as the explosion was caused by fire, the latter was the proximate cause of the loss."¹⁷

§ 327. The Keeping or Storing of Explosives, when Prohibited, will Avoid the Policy.

The insurance policy in most cases prohibits the keeping or storing of such explosive substances as gunpowder, dynamite, nitroglycerine and saltpeter, and the courts have held without exception that when these things are kept on the premises insured, in violation of the terms of the policy, the insuring company will not be liable.¹⁸ In one form or another, the courts have frequently been called to consider this inhibitory clause of the insurance contract, in reference either to the precise meaning of the words used or on account of an alleged waiver of the provision. In *Stout v. Commercial Union Assur. Co.*¹⁹ the property insured was a wholesale stock of groceries. Special permission was given to keep 50 pounds of gunpowder. On the trial of the case it was shown that there was in the store, at the time of the fire, a quantity of saltpeter, variously estimated by the different witnesses as from 100 to 300 pounds. This was one of the articles forbidden to be kept, but it was claimed by the plaintiff that saltpeter was a common and ordinary article of merchandise belonging to a stock of wholesale groceries, and that in writing a policy covering generally, and without any limiting words in the written part of the policy, the prohibition was

¹⁷ *City Fire Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367; *Briggs v. Insurance Co.*, 53 N. Y. 446; *St. John v. Insurance Co.*, 11 N. Y. 516; *United Life, Fire & Marine Ins. Co. v. Foote*, 22 Ohio St. 348; *Boatman's Fire & Marine Ins. Co. v. Parker*, 23 Ohio St. 94.

¹⁸ *Faulkner v. Assurance Co.*, 1 Kerr (N. B.) 279; *Trustees of Fire Ass'n of Philadelphia v. Williamson*, 26 Pa. St. 196; *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *Couch v. Insurance Co.*, 25 Hun (N. Y.) 469.

¹⁹ 11 Biss. 309, 12 Fed. 554, and 11 Ins. Law J. 688.

waived. It was admitted by the defendant that saltpeter usually formed a part of a wholesale grocery stock. Judge Gresham heard the case, and appears to have had some doubts as to the liability of the insurer, and, in holding it liable, he explained that, in construing an insurance contract, when doubt exists, it is the duty of the court to give such construction as would be most favorable to the insured. The defendant's counsel argued that by expressly mentioning "gunpowder," and by excepting it from the prohibitory condition, the restrictions imposed as to other explosives would continue in respect to all other articles prohibited. While admitting the force of this argument, which lies so closely to the generally accepted rule of interpretation, Judge Gresham said: "Written permission being given to keep gunpowder, a much more explosive and dangerous substance than saltpeter, it would be unreasonable, if not unjust, to hold the policy void because the latter was kept." Mr. Wood, in criticising Judge Hallett's decision in *Sperry v. Springfield Fire & Marine Ins. Co.*,²⁰ insists upon applying the same principle of construction as Judge Gresham has here put aside as "unreasonable and unjust." In the policy in that suit, among other explosive substances forbidden to be kept were gunpowder and nitroglycerine. It was not contended that any explosive was kept, known by either of these specific names, but it was shown that, when the fire occurred, there were 700 pounds of an explosive substance known as "giant powder." The court found, on a careful inquiry into the constituent properties of giant powder, that it contained little or nothing having an explosive force except nitroglycerine; that, the latter being in liquid form, it was in a larger degree dangerous in transportation, and less convenient for use, and it was found to be of advantage to combine with it certain dry ingredients, that would serve no other purpose than to form an admixture that would not flow. To this compound was given the name of "giant powder." The court held that it was a prohibited article, recognizing the principle that the intention of the parties should be considered; that, as the rose will smell as sweet when called by another name, so will nitroglycerine retain its disastrously explosive and dangerous qualities when stored and kept under the name of "giant powder." A

²⁰ 26 Fed. 234, 15 Ins. Law J. 270.¹

distinguished jurist once remarked that "calling snow hot did not make it even warm." Mr. Wood, criticising this case, invokes the general rule before stated, and says: "Having specifically designated what explosives should not be kept, it must be treated as consenting that all others may be kept." Mr. Wood then adds:²¹ "If the identity of nitroglycerine is lost by its combination with other agents, and a new and distinct explosive is the result, then the mere circumstance that nitroglycerine is one of its main and important constituents does not make the condition operative to exclude the keeping of the new product." He then asks, by way of illustration, "If wheat flour kept on the premises would avoid the policy under its conditions, would the keeping of wheat bread also work an avoidance?" Mr. Wood, I think, has failed to distinguish between the essential character of the explosive under consideration and its trade-name. Judge Hallett pointed out with much care and particularity that giant powder, in all of its important constituent elements as an explosive, was the same as nitroglycerine; that for greater safety in transporting and storing, and better convenience in use, its liquid form was changed to a solid or paste by the mixture of certain non-explosive absorbents. Too much importance is given by Mr. Wood to a simple "change of identity." The midnight burglar is none the less a thief and assassin because of the disguises that effectively conceal his identity. Should the arbitrary rule of interpretation insisted on by Mr. Wood prevail, the use of specific names in designating prohibited articles should be abandoned, as a slight change in form and a new, distinctive title would be sufficient to defeat the intention of the parties to the contract. The murderer "Brown," as "Mr. Jones," with his hair dyed and face shaven, must be discharged by the court. Such is the logic of Mr. Wood's contention.

The celebrated Steinbach cases were in court for about 14 years.²² Steinbach was a merchant in the city of Baltimore, and had insurance in the Lafayette Fire Insurance Company and the Relief Fire Insurance Company. The policies read, "On stock of fancy goods, toys, and other articles in his line of business, contained in his store, and occupied by him as a German jobber and importer." In the printed

²¹ 1 Wood, Ins. 176.

²² Steinbach v. Relief Ins. Co., 77 N. Y. 498; Id., 13 Wall. 183; Steinbach v. Lafayette Ins. Co., 54 N. Y. 90.

conditions of his policies "fireworks" were prohibited, but by indorsement the keeping of "firecrackers" was permitted. A loss having occurred from the accidental ignition of "fireworks," the insurer denied liability. Suit was brought against the Lafayette Insurance Company in New York. It was claimed by plaintiff that "fireworks" were part of a "German jobber's and importer's" stock, and the court received evidence aliunde to show that such was the case. The special permit to keep firecrackers, the court conceded, was a strong argument in favor of the defendant's contention that "fireworks" were not excepted from the general prohibition, and it appears the New York court of appeals reached the conclusion with some doubt and hesitation that the agreement to insure goods "in his line of business" made the company liable. The case against the Relief Insurance Company, which was tried in the federal court of Maryland, had a different result. It was held that the terms of the policy prohibited the keeping of fireworks. The court rejected proofs offered by plaintiff to show that fireworks constituted a part of the stock usually kept in the line of a German jobber and importer's business. Judgment was for defendant, which was subsequently affirmed by the supreme court of the United States, where the case was carried on writ of error. This was a notable instance where the highest court of a nation and the highest court of a great state have held to different principles of law under identical conditions. One company was required to pay, while the other was discharged.

§ 328. When Policy is Silent in Regard to Keeping Explosives.

When the policy is silent in regard to the using and keeping of explosives or highly inflammable substances, however imprudent such use or storage may be, the fact will not discharge the insurer, unless the circumstances are so extraordinary as to make it improbable that such use of the premises was in the contemplation of the parties when the insurance was negotiated and the rate of premium agreed upon. The insured will be presumed to have the right to use and to keep such things as may be convenient or necessary to his comfort, or to the accommodation of his business,

and the most profitable employment of the property to which the insurance refers.

§ 329. Customary Use.

But it will be otherwise if the policy distinctly prohibits the using or keeping of dangerous articles particularly specified. Custom and ordinary use will create a presumptive right only when the contract is silent or its meaning uncertain. The insurer has unquestionably the privilege to decline acceptance of a risk, except on conditions which he may impose; and as to whether such conditions are reasonable he has the power of ultimate decision. The parties do not come together by compulsion. There is an absolute freedom of choice. They may agree on terms, advantageous or otherwise, or they may refuse to agree altogether; but when the minds of the insurer and insured have met, and the terms of their agreement are distinctly set forth in the policy, there is nothing for the courts to construe, and it is not for them to say that particular things cannot be prohibited because of their customary use in connection with the business to which the insurance relates. In consideration of the insurer's promise of indemnity at a rate of premium named, the insured surrenders somewhat of the uses and privileges that he has ordinarily enjoyed in the occupation of his premises, or in the management of his business. Whether he has acted wisely or not is immaterial. He has exercised his natural and his constitutional right to make his own contracts, and that is an end of the matter.²³

²³ *Reeve, Case & Co. v. Phoenix Ins. Co.*, 23 La. Ann. 219; *Liverpool & London & Globe Ins. Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, and 15 Ins. Law J. 161, reversing 20 Blatchf. 362, 34 Fed. 501; *Trustees of Fire Ass'n of Philadelphia v. Williamson*, 26 Pa. St. 196; *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *Cerf v. Insurance Co.*, 44 Cal. 320; *Couch v. Insurance Co.*, 25 Hun (N. Y.) 469; *Wheeler v. Insurance Co.*, 62 N. H. 326; *McFarland v. Insurance Co.*, 49 N. W. 253, 46 Minn. 519.

The following decisions are not in support of the text, and do not appear to the author to properly recognize the legal right of the parties to make their own contracts: *Fraim v. Insurance Co.*, 170 Pa. St. 151, 32 Atl. 613; *Faust v. Insurance Co.*, 91 Wis. 158, 64 N. W. 883; *Maril v. Insurance Co.*, 95 Ga. 604, 23 S. E. 463.

These cases are recent, and all recognize the illogical rule that the parties,

§ 330. Conditions must be Performed.

The promise of the insurance company to pay for property destroyed by fire rests upon the performance by the insured in respect to three important matters:

First. Payment of the premium. When this is not done (unless credit is given), the promise will fail, being without consideration.

Second. When the insured's interest in, or possession of, the property covered by the policy is changed, the insurer must be notified of the fact, and his consent obtained.

Third. The inhibitions expressed in the policy in respect to changes in the physical hazard must be faithfully observed, the agreement to indemnify being based upon the character and situation of the risk as known to the insurer, or represented by the insured, at the time the contract to insure is consummated.

It will be understood that the compensation which the insurer receives when accepting a risk is small, and that he may properly decline to assume a liability except within definitely expressed limitations. Presumably inquiry has been made concerning the person to be insured; and he has been found possessed of good moral character and safe business habits; and the property covered, it may also be presumed, has been ascertained to be satisfactorily cared for, and free from any special incidents that threaten its security. On this basis of facts, the rate of premium is fixed, and agreement to insure made. Then the parties stipulate that the hazard shall in certain respects remain unchanged, except in regard to such modifications as may be subsequently agreed to, and made the subject of written indorsement on the policy. The covenant concerning things to be disclosed before the risk shall take effect, and the changes inhibited, relate chiefly to title, incumbrances, possession, and the keeping or storing on the premises of articles that are dangerous on account of their explosive or highly inflammable character, such as gunpowder, the lighter products of petroleum,

in negotiating the insurance, had in contemplation the uses and requirements of the property or business insured, and that there was an implied agreement that explosives and highly inflammable substances could be used and kept on the premises, notwithstanding the distinct express prohibition.

etc. The small premium paid the insurer is not sufficient to compensate him for exercising a watchful care over the property during the term of the policy. Besides, the subject of insurance is often located so remote from the office of the insurer that surveillance is practically impossible. It must be remembered, too, that there is nothing in the relations between the insured and the insurer to create a right in favor of the latter to control the business affairs of the former. The insured may place his property in the custody of reckless and unsafe persons, or he may bring into his premises dangerously explosive and inflammable substances, in defiance of the insurer; and the only protection the latter has against the negligence or willful imprudence of the former is to provide in the policy that he will be relieved from the payment of any loss ~~which may occur when there have been such changes in the circumstances of the risk as are particularly mentioned and made the subject of special stipulation.~~ This involves no hardship to the insured. If his necessities or convenience require the keeping or storing of prohibited articles, or the giving of the insured property into the custody or control of other persons, and the insurer refuses consent, the right of cancellation is always available.

§ 331. When Insured is Responsible for the Acts of His Tenants.

When the policy contains a stipulation in effect the same as hereinbefore referred to, the insured engages performance not only for himself, but as well for his tenants, agents, and representatives. In *Liverpool & London & Globe Ins. Co. v. Gunther*²⁴ there was presented for the consideration of the supreme court of the United States the exact question here discussed. The policy insured an hotel, and provided for forfeiture if there should be kept on the premises, without permission, any of the lighter products of petroleum, etc. On the trial it was shown that the property was destroyed in consequence of the careless handling of gasoline or naphtha by one Walker, the husband of the lessee of the hotel. Matthews, J., said: "A violation of these prohibitions by any one permitted by the assured to occupy the premises is a violation by the assured himself.

²⁴ 116 U. S. 113, 6 Sup. Ct. 306, and 15 Ins. Law J. 161.

The company stipulates that it will not assume the risk arising from the presence of the articles prohibited, and, if they are brought upon the premises in violation of the policy by one in whose possession and control the latter have been placed by the insured, he assumes the risk which the company has refused to accept. In our opinion the defendant in error was chargeable with the acts of Walker if he brought upon the insured premises and stored in the oil room any of the prohibited articles, although they were not intended to be used on the premises, but for lighting a neighboring grove for a picnic. Walker was in no sense a stranger or a trespasser. With his wife he was in the lawful occupation of the premises, and with the implied assent of the insured, at least, was intrusted with the control and management of them; and under the terms of the conditions in this policy it must be held that the insured shall suffer the consequences of Walker's acts in doing that which, if done, the company had stipulated they would not be liable. The insured engaged that the prohibited things should not be done, and, when he committed the control of the insured premises to another, the latter became his representative, for whom he must answer as for himself."

In *Kelly v. Worcester Mut. Fire Ins. Co.*²⁵ the policy provided, among other things, that it would become void if the property insured should be used for unlawful purposes. In the agreed statement of facts submitted for the decision of the court, it appeared that the tenant of the insured, without his knowledge, was occupying the premises for the sale of intoxicating liquors, in violation of law. Justice Gray, who wrote the opinion of the court, said: "Use of the building for an unlawful purpose by the tenant, even if unknown to the owner, voided his policy by the terms of the first proviso, the manifest object of which is to define certain risks which the insurer will not assume, without regard to the question whether they arise or exist by the act or with the knowledge of the assured."

²⁵ 97 Mass. 284, 5 Benn. Fire Ins. Cas. 122.

§ 332. Immaterial Whether or not the Prohibited Articles Caused the Fire.

I think the court here states the correct rule of law. Whether or not the insured permitted or had knowledge of the act which the policy prohibited is immaterial. He had stipulated that the company should not be bound to the payment of a loss if the building insured was used for an unlawful purpose, and the burden was on him to prevent its being so used. This he had clearly engaged to do, consenting to a forfeiture in case of neglect or failure to perform.

This view was held by Savage, C. J., in deciding the case of *Duncan v. Sun Fire Ins. Co.*²⁶ The policy there prohibited the storing of gunpowder. The court said: "Whether the powder was there with the knowledge or agency of the plaintiff seems to me not very material. The absence of agency or knowledge on the part of the plaintiff excuses him from imputation of fraud, or an intention to violate his contract. * * * The plaintiff could not be supposed to know what articles were deposited in all these buildings, they being let to different persons. * * * But whether he knew that there was powder in the stores or not, if the buildings were used in a manner prohibited by the policy, the liability of the defendant ceases."

In *Mead v. Northwestern Ins. Co.*²⁷ we find the question here presented discussed with much clearness and vigor. The stipulation in the policy in that suit was against the use of camphene, which, it was claimed, had been discontinued before the occurrence of the fire. The court held that the stipulation concerning the prohibited articles was an express promissory warranty, and that the materiality of the thing warranted was not a question for it to consider. "It was of no consequence," Judge Wells said, "that the fire was not caused by a breach of the condition." And he said, further: "It is equally unimportant that the respondent was ignorant that such business was carried on. The question whether a warranty has been broken can never depend upon the knowledge or ignorance or intent of the party making it, touching the acts or the facts constituting the breach."²⁸

²⁶ 6 Wend. (N. Y.) 488.

²⁷ 7 N. Y. 530, 3 Benn. Fire Ins. Cas. 483.

²⁸ *Trustees of Fire Ass'n of Philadelphia v. Williamson*, 26 Pa. St. 196; *Diehl v. Insurance Co.*, 58 Pa. St. 443; *Murdock v. Insurance Co.*, 2 N. Y. 210.

§ 333. Conclusions.

When the policy insures against loss by fire, there will be no liability on account of explosion, unless there was fire either before or after the explosion occurred. If the explosion was caused by or occurred during the progress of a fire, it will be regarded only as an incident, and the insurer will be liable for the loss, unless the policy otherwise stipulates.

Insurance against loss by fire does not include loss by lightning, unless fire ensues.

A lighted gas burner, lamp, or match is not "fire," within the meaning of an insurance policy. Hence an explosion from gas being ignited by such agencies will not be construed as being "caused by fire"; that is to say, fire will not be regarded as the proximate and efficient cause, and the explosion only as the incident.

When the policy does not clearly express the intention of the parties, it will be construed in reference to the uses and special circumstances of the risk to which it relates; but, when its permissive, and prohibitory provisions are clearly and definitely stated, there is no room for construction, and the courts will have no power to change or reconstruct the policy, so as to better adapt it to the special conditions, occupations, or uses of the risk covered.

A violation of the conditions of the policy by any one whom the insured permits to use or occupy the premises insured, even temporarily, will be a violation by the insured himself. The insurance company has no right to control the property. The insured has, and, when he surrenders such control to another, he continues responsible for the performance of the policy conditions in respect to the uses and occupation of the insured property.

CHAPTER XX.

CONDITIONS PRECEDENT.

- § 334. What are Conditions Precedent.
- 335. Conditions Precedent must be Performed unless Waived.
- 336. Warranties and Conditions Precedent, in Respect to Their Dignity and Importance, are Essentially the Same.
- 337. Conditions Precedent do not Depend upon Any Particular Form of Words.
- 338. When the Conditions and Requirements of the Policy are a Part of the Consideration.
- 339. Conditions Defined.
- 340. General Observations Concerning Conditions Precedent.

§ 334. What are Conditions Precedent.

The insurance contract is one of mutual obligations. The insured is bound as well as the insurer, and on his faithful and prompt performance it will often occur that the liability of the company is made contingent. There are certain provisions in all policies which are commonly designated "conditions precedent." These require something to be done by the policy holder before the insurer can be charged with the loss. It is not always easy to distinguish, in the language of a contract, what is intended as a mere promise, or even as a warranty, from a condition precedent. Forfeitures, we are often told, are repugnant to the law; and the courts generally interpret words and construe sentences on the very equitable principle, "*Ut res magis valeat quam pereat*;" and, in order to secure this purpose, it will sometimes happen that the language of an insurance policy will be given a strained interpretation,—such meaning as will impose burdens upon the insured or the insurer, not entirely as it was contemplated they should be shared. Sometimes provisions which were fairly intended and understood as conditions upon which the liability of the insurer should depend, by the fiat or grace of the court are so far emasculated as to lose their significance, and wholly defeat the purpose for which they were incorporated in the contract. Langdell, in his "Summary

of Contracts,"¹ discussing the "condition precedent," says: "If the words used in a contract are by the party who is to do the act, they plainly import that he binds himself to do so; while, if they are used by the party for whose benefit the act is to be done, they fairly mean that he will require it to be done,—that is, his own obligation should be contingent upon its being done. * * * Any clause, therefore, in a policy of insurance, requiring anything to be done by the insured, will be a condition of the covenant or promise of insurance." Among the more important "conditions precedent" that are common to all fire insurance policies are those relating to the payment of the premium, the disclosure of title and incumbrances, notice and proofs of loss, and arbitration.

§ 335. Conditions Precedent must be Performed unless Waived.

Unless it has been waived, payment of the premium must be made; otherwise, there will be no consideration,—nothing to support an obligation on the part of the insurer; and besides, too, payment by express words is made a condition of any liability attaching under the policy. A person seeking insurance may agree with the agent of the insurer for the future payment of the premium, and on this agreement an obligation will rest, so as to create a liability for any loss occurring before payment of the premium is actually made, the "condition precedent" having been waived. But in the absence of usage qualifying the rule of law, and when no agreement has been made in regard to a credit for payment of the premium until after the policy has been delivered to the insured, and when the policy contains a clause expressly prohibiting the agent from waiving any of the conditions of the policy, no agreement then made to excuse payment or to extend its time can be a waiver of the condition that "the company shall not be liable until the premium has actually been paid." In this respect, the law, it seems, is not generally understood; and a somewhat loose and dangerous practice has come to exist, one that occasions the insurance company much inconvenience and loss of revenue, and one that often involves unknown and unsuspected perils to the insured.

¹ Section 33.

§ 336. Warranties and Conditions Precedent, in Respect to Their Dignity and Importance, are Essentially the Same.

In a close analysis of the principles involved, we do not find that, ordinarily, there is any clear distinction between a warranty and a condition precedent. The chief elements of each are common to both. That clause of policies, for instance, requiring disclosure of incumbrances under penalty of forfeiture, is generally treated as a warranty; and, while most frequently expressed in a form that is promissory, these clauses are wanting in none of the essential elements of a "condition." It is distinctly declared that, unless the incumbrance is disclosed, the company shall not be liable; and, whether regarded as a warranty or condition precedent, the legal effect is practically the same. The insured has given, as it were, in either case, security that no fact is withheld in regard to the impairment or limitation of his title either by liens, mortgages, or otherwise, in the promise that, unless the disclosures are full and truthful, the indemnity shall fail. Warranties and conditions are alike in respect to the fact that their legal effect does not depend on their materiality. Their relations to the obligations created by the contract have been definitely fixed by the agreement of the parties, and the courts will not enter upon any inquiry to ascertain whether the failure to perform has resulted in the violation or infringement of substantial rights.

The supreme court of Indiana, in *Baker v. German Fire Ins. Co.*,² defines warranties, when expressed upon the face of the policy, to be "conditions precedent." In that case it was set forth in the written part of the policy that the building insured was "occupied as an hotel, with bar and billiard room attached." "This language," the court said, "related to the character of the risk at the time the contract was made, and was in the nature of a 'condition precedent' to the taking effect of the policy. If it was not so occupied, then the minds of the parties never met upon the subject-matter of the contract; and the policy did not attach." Here no performance was

² 124 Ind. 490, 24 N. E. 1041.

required as the antecedent of "condition." The statement that the building was occupied in a particular manner was a warranty, and, if untrue at the inception of the contract, the insurer was never bound. The court uses the terms "warranty" and "conditions precedent" synonymously. As I have already suggested, it is frequently difficult to distinguish one from the other. It will generally, I think, be found that, while differing somewhat in their form and application, they are essentially the same in element, and equal in dignity and obligation.

§ 337. Conditions Precedent do not Depend upon Any Particular Form of Words.

When insuring merchandise, companies often provide that an iron safe shall be kept, and inventories and books of account shall be deposited in such safe during the nighttime and when not in use. If, by proper form of words, their liability is made contingent upon compliance with this condition, a failure will invalidate the insurance.³ In *Pelican Ins. Co. v. Wilkerson* * the "iron-safe clause" provided that the insured should "keep a set of books showing a record of all business transactions, including purchases and sales, together with last inventory, * * * and produce such books and inventory; and, in the event of failure to produce the same, the policy should be void." On the trial it was shown that the insured had an iron safe, and that the last inventory and books were kept as required; that the inventory was exhibited to the adjuster soon after the fire, but was subsequently lost; that the books were produced on demand, but did not show a "record of all the purchases and sales," and were useless for the purpose of ascertaining the amount of loss sustained. The court held that the insured, having failed to keep such books as he had promised to do, could not recover. In *Worsley v. Wood*,^b Lord Kenyon, C. J., in stating the rule of law on this subject, said: "If there is a condition precedent to an impossible thing, the ob-

³ *Liverpool & London & Globe Ins. Co. v. Morris*, 79 Ga. 666, 5 S. E. 125; *Jones v. Insurance Co.*, 38 Fed. 19; *Landmann v. Insurance Co.*, 18 Ins. Law J. 813; *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103.

⁴ 53 Ark. 353, 13 S. W. 1103. ⁵ 6 Term R. 710; Langd. Cas. Cont. 472.

ligation becomes single: but, however impossible the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest."

§ 338. When the Conditions and Requirements of the Policy are a Part of the Consideration.

It is a common provision of an insurance contract that, when a loss occurs, notice shall at once be given to the company, and that, as soon thereafter as possible, proofs shall be furnished. Often the time is definitely specified within which proofs will be accepted, as 30 or 60 days. This clause is generally supplemented by another, which provides "that, until such notice and proofs are received, the loss will not be due and payable." This covenant to furnish proofs as soon as possible, or within a designated time, imports a condition only that no right of action will exist to recover under the policy until the proofs required by its terms are presented. This was held in *Kenton Ins. Co. v. Downs*;⁶ but the case is different when, as most frequently occurs, the policy provides by some general clause for either a literal or substantial performance in respect to everything which the insured has engaged to do. On the examination of a large number of policies, I find this provision, in slightly different form of words, common to them all: "In consideration of the conditions, limitations, and requirements of this policy hereinafter mentioned, and the payment of \$——, the —— will indemnify." It will be observed that the consideration for the insurance promised, besides the premium paid, embraces every condition which the insured is to perform, every limitation which may qualify or lessen the burdens of the insurer, and every requirement which may contemplate its convenience or advantage. The provision, it will be seen, that proofs shall be made within a time named, must be complied with, and the duty in this respect is no less essential and imperative than the payment of the premium. Both are parts of the consideration, and are equal in dignity and importance as regards the creating of a right for one party and an obligation for the other. If the payment of the premium, there-

⁶ 13 S. W. 882 (Ky.).

fore, is a "condition precedent," so is the performance of every material requirement; for, by the terms of the policy, payment and performance mean identically the same thing in respect to the matter of consideration, on which alone rests the undertaking to insure.

Almost without exception, the courts of this country and England have held that proofs of loss must be furnished as provided by the policy, or the insurer would be discharged. Among jurists and text writers who have been called upon to discuss this question during the more recent period of the evolution of the insurance contract, there has been a consensus of opinion in agreement with this proposition, until we reach the case of *Kenton Ins. Co. v. Downs*,⁷ before referred to; and in justice to the court of appeals of Kentucky, who heard that case, it is proper that we should mention that, so far as the reports disclose, the policy in that suit did not make its conditions and requirements a part of the consideration, nor does it appear that there was any general clause making the liability of the company to pay a loss contingent upon the performance by the insured of all or any of the requirements concerning proofs. Wood on Insurance⁸ declares the law to be: "When the policy requires that the proofs shall be made out and forwarded to the company within a specified time, as ten days, thirty days, or sixty days, unless such proof is made within that time, or facts shown that establish a waiver of strict compliance, no recovery can be had." This same principle is asserted by May.⁹ His statement is that "a failure to furnish any proofs at all within the required time will be fatal."

§ 339. Conditions Defined.

What facts and circumstances are necessary to establish a "condition precedent" is discussed and forcibly illustrated in the case of *Baird v. Evans*.¹⁰ It was there held that, before a party can recover on a contract, he must have performed his part of it, or have been ready and willing to do so, unless prevented or excused from so doing. The plaintiff had stipulated that he would dig a stock well, break the prairie, build a stable, and do certain other things; and the defendant

⁷ *Supra*.

⁸ Section 436.

⁹ Section 465.

¹⁰ 20 Ill. 30.

agreed that, in consideration of these things being performed, he would pay a rent of \$400 for the premises. It was the opinion of the court that the promises of the plaintiff were, in their legal effect, conditions precedent, and, not having been performed, the defendant was excused.

A large number of cases is reported under building contracts, where there has been an agreement to pay money as the work advanced, not to exceed a certain per cent. of the money expended by the contractor, as shall appear by the architect's certificate; and, so far as my inquiry extends, there is no exception to the rule that the furnishing of an architect's certificate is a condition precedent, and without it no payment can be required. In the case of *Braunstein v. Accidental Death Ins. Co.*¹¹ the court held that "a condition precedent does not require any particular form of words for its creation." So, too, in *Hotham v. East India Co.*, Ashhurst, J., in delivering the judgment of the court, says: "There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend upon the circumstances whether the clause is placed prior or posterior in a deed, so that it operates as a proviso or covenant, for the same words have been construed to operate as either the one or the other, according to the nature of the transaction." *

§ 340. General Observations Concerning Conditions Precedent.

Where the consideration for the insurance is in part money and in part the promised performance of the conditions and requirements of the policy, the obligation of the insurer to pay the loss rests entirely upon the performance of such conditions and requirements by the insured; and when notice or proofs of loss are required to be furnished within any particular time, as 10, 30, or 60 days, a failure to comply will be fatal. Unless waiver can be shown, a partial performance will not be sufficient. The money part of the consideration having been paid does not create an obligation on the part of the insurer to pay a loss. It is stipulated that the insured must do certain

¹¹ 1 Best & S. 782.
(718)

* 1 Term R. 645.

other things which may be of equal or even greater importance than the payment of the premium. These requirements of the policy may refer to matters affecting the character of the hazard, or to things which the insured is to do subsequent to the loss. Langdell, in *Summary of Contracts*,¹² says: "Detriment to the promisee is the universal test of the sufficiency of consideration." That which the parties have agreed upon as a consideration for the promise of the insurer to pay a loss may not be withheld, whether it consists of a stipulated sum of money or the performance on the part of the insured of certain acts, which, by the agreement of the parties, are made material and indispensable. In *Tidey v. Mollett*¹³ the defendant had agreed to rent a house owned by plaintiff, stipulating that certain specific repairs and changes should be made before the 14th of June. We quote from the contract entered into by the parties, as follows: "In consideration of these conditions being fulfilled (meaning the stipulation in regard to changes and repairs), Mr. Mollett engages to take the house No. 51 Belsize Park, at an annual rental of £130." The repairs were not made within the time specified, and the defendant refused to take possession of the house. Erle, C. J., said: "I am of the opinion that our judgment should be for the defendant. * * * I am of the opinion that the pleas show a nonperformance of a condition precedent. * * * I think the defendant was quite right in insisting upon the repairs being accomplished some days before that fixed for the commencement of his tenancy and his taking possession of the house. It is therefore very probable that the 14th of June was a material day, and we all think that, in the absence of anything in the agreement or surrounding circumstances to remove this presumption, we ought to give effect to it." And Willes, J., added: "I am of the same opinion. It has been ingeniously argued that the completion of the repairs by the 24th of June would have been sufficient, but a very proper answer to that was given by the learned counsel for the defendant, namely, that the proviso for the completion of the work by the 14th of June might very well be inserted, in order to enable the defendant to establish himself within a reasonable time before the commencement of the tenancy. The proviso is made a con-

¹² Section 64.¹³ 33 Law J. C. P. 235.

dition precedent by the terms of the agreement." In *Worsley v. Wood*,¹⁴ the policy required that in the event of loss the insured should procure a certificate under the hand of the minister and churchwardens and some other reputable householders of the parish. The declaration set out that the plaintiff had delivered to the defendant the certificate of four reputable householders of the parish, and that the plaintiff had applied to the minister and church wardens of the parish to sign the certificate, but that they had refused to do so without reasonable or probable cause, and that such refusal was wrongful and unjust. Lord Kenyon, C. J., said: "So here it was competent to the insurance office to make the stipulation in their printed proposals. They had a right to say to individuals who were desirous of being insured: 'Knowing how liable we are to be imposed upon, we will, among other things, require that the minister, church warden, and some of the reputable inhabitants of your parish shall certify that they believe that the loss happened by misfortune, and without fraud; otherwise, we will not contract with you at all.' If the assured say that the minister and church wardens may obstinately refuse to certify, the insurers answer: 'We will not stipulate with you on any other terms.' Such are the terms on which I understand this insurance to have been effected, and therefore I am clearly of the opinion that there is no foundation for the action." We quote also from the opinion of Justice Grose, filed in the same case. He said: "It is true that the minister and church warden were not bound to certify, but the insured undertook to secure such a certificate; that is a condition, on performing which alone the insurance company engaged to pay any loss that might arise." The rule of construction here affirmed cannot well be questioned, and applies to all stipulations and requirements expressed in the policy. When it appears from the language employed that it is the intention of the parties that payment of a loss will depend on the performance of any particular thing by the insured, and when such stipulations and requirements are made a part of the consideration for the promise or engagement of the insurer, there can be no recovery under the policy, unless the insured shows such performance. The question of materiality can-

¹⁴ 6 Term R. 710.

not be raised. That which is required to be done has been made material by the agreement of the parties.¹⁵

The action was to recover for work done and material furnished under the terms of a building contract, which provided, among other things, that no sum should be payable except on the certificate of the surveyor that the work had been properly performed in accordance with the plans and specifications. Evidence was offered to show that the defendant had appointed his own father as surveyor, and that, while the work had been faithfully done, the defendant was seeking to defeat payment by fraudulently colluding with the surveyor to withhold the certificate. The court held that this evidence was inadmissible.

Pollock, C. P., said: "Where, by the contract itself, a certificate of a surveyor, is made a condition precedent to the right of payment, even if it be withheld by fraud (that would be the subject of the cross action), the nonsuit therefore was right."¹⁶

In *President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co.*¹⁷ the contention arose in respect to tolls. The contract on which the action was based provided that, in case there should be any dispute as to the amount of tolls to be paid, the question should be submitted to arbitrators. Allen, J., in delivering the opinion of the court, said: "Defendant only undertook to pay such rates of toll as should be established and prescribed in the instrument, and cannot be compelled to acquiesce in the matter in any other manner; and, until a right is established, no liability is incurred under the contract or right of action given." See, also, *Scott v. Avery*,¹⁸

¹⁵ *Braunstein v. Insurance Co.*, 1 Best & S. 782. See, also, *Milner v. Field*, 5 Exch. 829.

¹⁶ *Ranay v. Alexander*, 1 Yel. 76; *Thurnell v. Balbirnie*, 2 Mees. & W. 786; *Coombe v. Greene*, 11 Mees. & W. 480; *Rae v. Hackett*, 12 Mees. & W. 724; *Armitage v. Insole*, 14 Q. B. 728; *Ellen v. Topp*, 6 Exch. 424; *Herrick v. Belknap*, 27 Vt. 675; *Aetna Ins. Co. v. People's Bank*, 10 C. C. A. 342, 62 Fed. 222.

In *Dover Glass-Works Co. v. American Fire Ins. Co.* (Del. Err. & App.) 29 Atl. 1039, the court said: "When a right and a duty, springing from a contract, are united in one of the parties thereto, he must show a performance of the one before he can assert the other."

¹⁷ 50 N. Y. 250.

¹⁸ 5 H. L. Cas. 811.

where will be found a full and able presentation of the underlying principles involved in the discussion of this subject.

Mr. Wood, in his *Treatise on Insurance*,¹⁹ says: "When the policy requires that such proofs shall be made and conditions complied with, to establish a legal claim upon the company for a loss, all the conditions must be substantially if not strictly complied with, or no recovery can be had." And in *Owen v. Farmers' Joint-Stock Ins. Co.*²⁰ the court said: "The first question presented on this subject is whether the omission of the plaintiff to deliver a particular account of his loss and damage within ten days after such loss, according to the seventh section of the condition annexed to the policy, is fatal to his right of recovery. Such a condition is doubtless a condition precedent, the performance of which by the plaintiff is indispensable to the right of recovery."²¹

In the case of *Slater v. Emerson* the plaintiff agreed to complete certain work at a particular time named, and, in payment, the defendant was to execute and deliver his note for a specified sum; but, the work not being completed at the time stipulated, the defendant refused to make and deliver his note. The supreme court of the United States held that the completion of the work at the time mentioned in the agreement was a condition precedent, and, there having been a failure to perform within the time, the court could not enforce the delivery of the notes. Additional authorities bearing on the general proposition here discussed may be found in chapters on "Arbitration" and "Notice and Proofs of Loss."

¹⁹ Section 411.

²⁰ 57 Barb. (N. Y.) 521.

²¹ 19 How. 224.

CHAPTER XXI.

CONCERNING LIABILITY OF WATER-SUPPLY COMPANIES.

- § 341. When Water-Supply Companies are Liable.
- 342. When There is No Privity between the Person Suffering Loss and the Water-Supply Company.
- 343. Obligation of Water-Supply Company to the Rate-Paying Citizen.
- 344. When a Municipal Corporation, for a Consideration, Agrees to Supply Its Citizens with Water, It will be Liable for Its Failure to Perform.
- 345. Where the Contract between the Municipal Corporation and Water-Supply Company is Made for the Benefit of the Individual Citizens.
- 346. When Municipal Corporations cannot be Made to Respond in Damages on Account of Their Failure to Supply Water.
- 347. Law Unsettled.
- 348. The Relations between the Water-Supply Company and the Citizens, for Whom the Municipality Contracts.

§ 341. When Water-Supply Companies are Liable.

To whom and to what extent water-supply companies are liable, when property is destroyed by fire through their failure to furnish water at the right moment, or in sufficient quantities, to prevent or extinguish a conflagration, has been the subject of much contention. From an examination of nearly all the cases reported, it is found in most instances that water companies engage with the municipal governments, in consideration of certain important franchises and the payment annually of a stipulated sum, to furnish water for the use of the municipality, for domestic use of its citizens, and for the purpose of extinguishing fires, in the manner and to the extent specified. Failure to perform in the latter respect has generally been the cause of the legal controversies referred to. These discussions have been unsatisfactory in the fact that no rule has been evolved of general acceptance.

The courts have had to deal with these cases, as presented, in two distinct classes,—one where the water was furnished by the municipality, and the other where the municipality dealt with an independent water-supply company. In the latter case the obligation of

both parties is found to be generally expressed by a municipal ordinance accepted by the water-supply company. Suits have sometimes been brought against the municipal government and sometimes against the water company, and always by persons who have suffered loss of property by fire because, through the fault or neglect of one or the other, the quantity of water has been insufficient or unavailable to extinguish a fire when the occasion of danger arose. It has been urged, on the part of those who have been seeking to enforce a liability against the party charged with the nonfeasance, that the municipal ordinance had the force of statutory law in respect to creating an obligation on the part of the water company; that the latter, in accepting this action of the municipality, and appropriating the franchise offered, had been brought into such relations as to create a public duty, which must be performed in respect to the individuals for whose benefit the arrangement between the waterworks company and the municipality had been perfected.

In an English case (*Atkinson v. Newcastle & G. Waterworks Co.*)¹ this rule was denied, but it must be observed that the supply of water to individuals in that case was gratuitous, and this fact appears to have had a marked influence on the mind of the court. The lord chancellor said: "That this creates a statutory duty, no one can dispute; but the question is whether the creation of that duty gives a right of action for damages to an individual who, like the plaintiff, can aver that he had a house situated within the company's limits, and near to one of its fire plugs, that a fire broke out, that the pipes connected with the plug were not charged at the pressure required by the section, and that in consequence his house was burned down. Now, a priori it certainly appears a startling thing to say that a company undertaking to supply a town like Newcastle with water would not only be willing to be put under this parliamentary duty to supply gratuitously, for the purpose of extinguishing fire, an unlimited quantity of water at a certain pressure, and to be subject to penalties for the nonperformance of that duty, but would further be willing, in their contracts with parliament, to subject themselves to the liability of actions by any number of householders who might happen to have their houses burned down in consequence."

¹ 2 Exch. Div. 445, 21 Moak, Eng. R. 544.

In *Nickerson v. Bridgeport Hydraulic Co.* it was sought to base a liability on the ground that the relations of the parties created a duty which the defendant owed to the public, which must be performed to the plaintiff and others, in providing water to extinguish their fires. The court said: "We think it is clear that there were no contract relations between the defendants and plaintiffs, and consequently no duty which can be the basis of a legal claim."²

§ 342. When There is No Privity between Persons Sustaining Loss and the Water-Supply Company.

In this and in the several cases hereafter referred to, decided by the Iowa, Georgia, Pennsylvania, and Wisconsin courts, there is a distinct and unqualified dissent to the doctrine that a contract between a municipal government and water-supply company can be enforced in an action for damages brought by individual citizens, although it may be undisputed that the contract was entered into chiefly for their benefit. In each of these cases it is argued that there is no privity between the individual and the water company, and that, in consequence, a promise of the latter to the municipality cannot be enforced for the benefit of the former.

In *Davis v. Clinton Waterworks Co.*³ the law is stated as follows: "The city, in the exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires, and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. * * * These benefits she receives just as she does other benefits from municipal government." The reasoning of the court is that the citizen must look to police regulation for the protection of his rights; that contracts made by the municipality can be enforced only by its regularly constituted authorities; that its promisor cannot be compelled to answer in a multitude of suits brought by different individuals, who conceive themselves to be injured on account of the inadequate water supply.⁴

² 46 Conn. 24.

³ 54 Iowa, 60, 6 N. W. 126.

⁴ *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. 694; *Beck v. Water Co.* (Pa. Sup.) 11 Atl. 300; *Fowler v. Waterworks*, 83 Ga. 219, 9 S. E. 673; *Britton v. Waterworks Co.*, 81 Wis. 48, 51 N. W. 84; *Foster v. Water Co.*, 3 Lea (Tenn.) 42; *Fitch v. Water Co.*, 139 Ind. 214, 37 N. E. 982.

§ 343. Obligations of the Water-Supply Company to the Rate-Paying Citizens.

In the case of *Fitch v. Seymour Water Co.*⁵ the agreement between the city of Seymour and the waterworks company was expressed by the terms of an ordinance passed by the common council, and accepted by the waterworks company. This ordinance, in proper form of words, recited that the city, besides paying annually the sum of \$4,500, should grant to the waterworks company the use of the public streets for the laying of its pipes, and that in consideration of such payment and the grant of such franchises the waterworks company bound and obligated itself to furnish drinking water to the city offices, engine houses, free public schools and churches, to wash basins in city engine house, and 3 public drinking fountains for man and beast, and 100 fire hydrants, which should throw water from each through 100 feet of hose, 2½ inches in diameter, out of a nozzle 1 inch in diameter, 100 feet high, or 130 feet horizontally, to be used for the extinguishment of fires, and also to furnish water to flush out the sewers and gutters of the city. It also bound itself to keep the waterworks and machinery belonging thereto in such a state of readiness at all times that, as soon as a fire alarm was given, said water would be available to the full extent of the capacity and power of said waterworks immediately, for the extinguishment of said fire.

From the evidence given at the trial it was shown that plaintiff was a taxpayer in the city of Seymour, and the argument and logic of the case seem to support the contentions:

First. That the defendant, by reason of having accepted the obligations imposed by the ordinance, had a public duty to perform, which embraced in its benefits every property owner of Seymour.

Second. That the contract between the water company and the municipality was made not more for the benefit of the municipality itself than for the benefit of the inhabitants of Seymour.

The principles of law underlying both of these contentions have been frequently sustained by the courts. In *Sisk v. Crump*⁶ it was said: "There can, as a general rule, be no action, although there is negligence, unless the party guilty of negligence was under some

⁵ 139 Ind. 214, 37 N. E. 982.

⁶ 112 Ind. 504, 14 N. E. 381.

duty to the party who sustained the injury. While it is essential that the defendant should be under some duty to the plaintiff, it is not essential that the duty should be directly owing to him as an individual. A defendant who owes a duty to a community owes it, as a general rule, to every member of the community; and, if any member suffers a special injury from a breach of that duty, an action will lie.”⁷

When A. fails to perform his contract with B., there will be no right of action in C. on account of such neglect or abandonment, unless there is something in the circumstances of the case, some fact interrelating the parties, that creates a duty on the part of A., either of a public or personal character. There will be no need of a privity of contract when such duty is shown to exist. In *Rich v. New York Cent. & H. R. R. Co.*⁸ it is said: “If the contract creates a relation out of which springs a duty independent of the mere contract relation, a breach of the contract is a tort, since there has been a legal duty violated, and every one within the scope and limit of this relation injured by the breach of duty has a right of action. * * * But such legal duty may arise not merely out of certain relations of trust or confidence inherent in the nature of the contract itself, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow in respect to his rights of property and person.”

In the case of *Fitch v. Seymour Water Co.*,⁹ while there was no privity of contract between the plaintiff and defendant, the facts stated unmistakably created a duty on the part of the water company in respect to all the inhabitants of the city of Seymour, and, through its failure to perform, the plaintiff suffered a great injury. In our social and legal compacts often many things are understood or implied. These sometimes are the foundations upon which we build, and, again, they may be the beams and braces of the superstructure. To all of our obligations there is an inseparable and undefinable soul. It may not appear in the formulated statute or written contract. This certain something is expressed by the word

⁷ *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113.

⁸ 87 N. Y. 395.

⁹ *Supra*.

"duty," and is recognized when interpretation proceeds, as it always should, from the highest considerations of justice. Every one understands that municipal governments, while legal entities, are no more than convenient regulations instituted by the people, that they may act in their aggregate character to secure their larger protection and happiness. Municipalities are the people acting in their corporate capacity. It was the people's money that the city of Seymour paid to the water company. It was for the benefit of the people that the promise was made on the part of such company to supply water for the use of the schools and churches, for public fountains, domestic use, and for extinguishing fires. In view of these facts, is it possible for any reasonable person to suppose that it was intended that the water company should have no duty to perform to the inhabitants of the city of Seymour? If such duty existed, and in its neglect damage resulted, does it not follow that the person wronged may have his action at law?

In Dicey on Parties to Actions¹⁰ the rule of law is stated as follows: "A breach of contract can be almost always represented in form as a tort; i. e. the plaintiff may sue, not for nonperformance of an agreement, but for the neglect of the duty which arises from or is connected with the agreement. The main object of adopting such course is to enable a stranger to a contract to sue for what either is, or at any rate may be considered, a breach of it."

In the rule for which recognition is here claimed, there are created no repugnancies, either of business, morality, or law, to be excused or provided for. Happily, in compelling performance in such a manner as to complete to all parties the full benefits of the original promise for which the consideration passed without violating any legal principle, the fullest measure of justice is secured.

§ 344. When a Municipal Corporation, for a Consideration, Agrees to Supply Its Citizens with Water, It will be Liable for Its Failure to Do So.

In *Conrad v. Trustees, etc.*,¹¹ Selden, J., in a brief commentary on *Henly v. Mayor, etc.*,¹² says: "The principle which lies at the basis

¹⁰ Page 391 (marg. p. 370).

(728)

¹¹ 16 N. Y. 162.

¹² 5 Bing. 91.

of that case, and the series of English cases upon the authority of which that case was decided, is this: that whenever an individual or corporation, for a consideration received from the sovereign power, had become bound by contract or agreement, either expressed or implied, to do certain things, such individual or corporation is liable, in case of negligence to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by the negligence. In all such cases the contract made with the sovereign power is deemed to inure to the benefit of every individual interested in the performance. The contract of the officer, except in the case of sheriff's clerks, etc., who receives compensation from private parties, is treated as made with the government alone, while that of the individual contractor is deemed to be made with and to inure to the benefit of every person interested in the performance."

Some years later we find this question again occupying the attention of the New York court in the case of *Robinson v. Chamberlain*.¹³ It was there said: "The same principle which gives relief against a contractor with the government gives like relief against the officer of the government, and an officer really contracts with the government to faithfully discharge the duties of his office, and usually adds an oath to that effect. He voluntarily assumes the duties. The public—the individuals thereof—usually are more especially interested in the proper discharge of the duties than the government itself. The principle on which the action is based in each case against an officer or contractor with the government is a broad principle of public policy, essential to the public welfare. * * * Each agrees to do his duty; the contractor in writing, the officer by implication and by oath. Upon every principle of sound reason, their liability to persons injured by their negligence should be the same."

Thus it is seen that only technical distinctions, relating chiefly to form, are not sufficient to deprive an injured party of his remedy. Mere fictions of the law that build up paper partitions separating a people in their natural relations from their other selves, represented in a civic or municipal character, will not have the effect to deprive

them of their liberties, which are no less sacred and inviolate when considered in their personal than in their corporate capacity.¹⁴

In *Hayes v. Michigan Cent. R. Co.*,¹⁵ Matthews, J., reviewing the case of *Atkinson v. Newcastle & G. Waterworks Co.*,¹⁶ expressed his unqualified dissent to the conclusions there reached. In his discussion of the matter he pulls down the fence between the rights of the public as a municipality and the rights of its separate and individual members. The court says: "The duty is not due to the city as a municipal body, but to the public considered as composed of individual persons, and each specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery."¹⁷

Judge Thompson, in his work on Negligence,¹⁸ illustrates this well-established rule of law as follows: "If A. makes a contract with B. for the protection of C., and C. is injured in consequence of B.'s breaking the contract, C. may recover damages of B. The city granted a license, containing a certain proviso, intended for the protection of its citizens. When the grantee accepted the license, the proviso ac-

¹⁴ See *Brooklyn v. Railway Co.*, 47 N. Y. 475; *Raynsford v. Phelps*, 43 Mich. 347, 5 N. W. 403; *Robinson v. Rohr*, 73 Wis. 436, 40 N. W. 668; *Bennett v. Whitney*, 94 N. Y. 302; *Hover v. Barkhoof*, 44 N. Y. 113; *Nowell v. Wright*, 3 Allen (Mass.) 166.

¹⁵ 111 U. S. 228, 4 Sup. Ct. 369.

¹⁶ 21 Moak, Eng. R. 541.

¹⁷ *Conwell v. Voorhees*, 13 Ohio, 523; *Sawyer v. Corse*, 17 Grat. (Va.) 230; *Central R. & B. Co. v. Lampley*, 76 Ala. 357; *Paducah Lumber Co. v. Paducah Water-Supply Co.*, 89 Ky. 342, 12 S. W. 554, and 13 S. W. 249; *Duncan v. Water Co. (Ky.)* 12 S. W. 557.

See, also, *St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. 571; *State v. Pierce*, 35 Wis. 98, 99; *Mason v. City of Shawneetown*, 77 Ill. 533; *Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; *Fowler v. Waterworks Co.*, 83 Ga. 219, 9 S. E. 673.

To the same effect are *Taylor v. Railroad Co.*, 45 Mich. 74, 7 N. W. 728, and *McCall v. Chamberlain*, 13 Wis. 637. In the last case it was said: "When the law imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose benefit it was imposed for any damages sustained by such neglect." See, also, *Whart. Neg.* §§ 285, 443; 2 *Thomp. Neg.* 904.

¹⁸ Page 906.

quired the force of a contract. The person to whom the defendant delegated the work failed to take the precautions stipulated for in the proviso, and in consequence of this a citizen for whose benefit the proviso was intended was injured. Here was clearly a cause of action against the defendant."

It will be observed that in each of the cases here examined the defendant agent has been held, by virtue of his relations to the subject, to have voluntarily accepted the obligation of performing a public duty, and it is because of this quasi official character in which he has agreed to act that he becomes charged with the consequences of his negligence. When an agent acts wholly in a private relation, his omissions and negligence concern only his principal, and to him alone will he be liable. This distinction should be kept in view. Unless we have maintained the proposition that a water-supply company, under contract with a municipal government to furnish water for the use of the public in extinguishing fires, has a "public duty" to perform, it will be admitted that this discussion has been without results.

§ 345. Where the Contract between the Municipal Corporation and the Water-Supply Company was Made for the Benefit of Its Citizens.

There is another well-settled rule of law that has a clear application where the facts establish that the contract between the water-supply company and the municipal government was for the benefit of "the public as composed of individual persons," as Justice Matthews expressed it in *Hayes v. Railroad Co.*, *supra*.

Where there is a contract between A. and B. for the benefit of C., the latter will have his action to enforce the contract. In a case of this kind there may be no privity between C. and the other parties, and yet the contract is enforceable as stated. Illustration: The Standard Insurance Company issued to John Brown its policy of \$5,000 insurance on store building. Afterwards the Standard reinsured all its risks in the Phenix Company. This last transaction was without the knowledge of Brown, and he was in no way privy to the contract between the Standard and Phenix Companies, but, should the property insured be destroyed by fire, Brown may proceed

against either the Standard or Phenix Company to collect his loss.¹⁹

When waterworks are built by taxation, and water is furnished to the inhabitants of a city on the payment of rates, the arrangements are not in any important sense for the benefit of the corporation, which, in fact, is hardly more than an agent for the transaction of the business. The beneficiaries are the corporators, at whose cost the works were constructed and are maintained. The city, in cases of this kind, has a trust to perform for its citizens, and may be held strictly to diligence and good faith.

This view appears to have the sanction of Judge Cooley.²⁰ He says: "In regard to all those powers which are conferred upon the corporation, not for the benefit of the general public, but of the corporators, such as the power to construct works, to supply a city with water or gas works or sewers and the like, the corporation is held to a still more strict liability, and is made to respond in damages to the parties injured by the negligent manner in which the work is constructed or guarded, even though under its charter the agents for the construction are not chosen or controlled by the corporation, and even when the work is required by law to be let to the lowest bidder."

Attention is asked to the discussion in the case of *Springfield Fire & Marine Ins. Co. v. Village of Keeseville*.²¹ The plaintiff there had paid one Emily E. Brewer \$4,450 in settlement of damages she had sustained to a building at Keeseville which plaintiff had insured. It was alleged for cause of action that said Brewer was a resident of defendant village, and paid the usual water rates, and was entitled to the full benefit and protection of the water supply which said village had engaged to furnish for various purposes, and particularly for extinguishing fires; and that at the time the property was destroyed the defendant had negligently allowed its pipes, pumps, and appliances to be and remain out of repair, and that in consequence of such negligence the fire which occasioned the damage had been much more disastrous than it would otherwise have been. Herrick,

¹⁹ *Johannes v. Insurance Co.*, 66 Wis. 56, 27 N. W. 414; *Fischer v. Insurance Co.*, 69 N. Y. 161; *Glen v. Insurance Co.*, 56 N. Y. 379; *Lawrence v. Fox*, 20 N. Y. 268.

²⁰ *Const. Lim.* (3d Ed.) § 249.

²¹ 80 Hun, 162, 29 N. Y. Supp. 1130; reversed in 148 N. Y. 46, 42 N. E. 405.

J., said: "When the defendant assumed the power of erecting and maintaining waterworks it assumed a twofold obligation,—one not to create any new source or condition of danger by the negligent exercise of such power, and the other to remove, or at least diminish, existing conditions or sources of danger, such as danger from fire. The first duty—that of not creating any new conditions of damage—it owes to all the world; the second—the removal or diminishing of existing conditions or sources of danger—it does not, perhaps, owe to the general public, but only to those who contribute to pay the expense of exercising such powers. * * * As we have seen before, when a municipal corporation assumes or accepts powers and duties that are not public in their nature, it is to be treated, in relation to those powers and duties, in the same way as a business corporation or a natural person would be. If a business corporation or natural person had made a charge for furnishing water, and had accepted payment of that charge, we would consider that a contract to furnish water to the person paying; and if that business corporation, by sheer mismanagement, the employment of incompetent men, and by negligence, had prevented the use of the water it had agreed to supply when it was most needed, the courts, I think, would hold such corporation or person liable for the direct resulting damages. * * * But, a public corporation having agreed to erect and take charge of a public work or enterprise for the people within its boundaries, those who contribute of their means to the erection and maintenance of such public work have a right to demand from the corporation reasonable care and diligence in maintaining it, so that it will discharge the functions for which it is created, and for which the contributors pay, and to hold it liable for a lack of such care and diligence. That, I think, can fairly be held to be the nature of the implied contract between the water-rent payer and the defendant."

Referring to the admissions of negligence and of wrongful and unlawful acts involved in the case as presented by the pleadings, the court said: "To hold that they do not constitute a cause of action is practically to hold that there is no responsibility attached to municipal corporations, no matter how culpable or willfully negligent they may be in discharging corporate duties they have voluntarily assumed to discharge; and that there is no penalty for the unfaithful

discharge of such obligations, unless some official performs some overt act which rises to the dignity of a crime."

§ 346. When Municipal Corporations cannot be Made to Respond in Damages on Account of Their Failure to Supply Water.

The New York court of appeals, in reversing the case of Springfield Fire & Marine Ins. Co. v. Village of Keeseville,²² expressed its dissent to the proposition that a municipality, in exercising its discretionary functions, by providing for the convenience and comfort of resident citizens, could be compelled to respond to an action for damages on account of its failure to perform efficiently such functions as it had voluntarily assumed to exercise in respect to supplying water, or the maintenance of a police and fire department.²³ In handing down the opinion of the court, Gray J., said: "Nor does the fact that water rents are paid by the inhabitants of the defendant affect the question. This fact is made use of to show the private corporate character of the waterworks system, and the suggestion is that profit or benefits accrue to the defendant whereby the corporate undertaking is affected with a private interest. But that is an incorrect notion. The imposition of water rents is but a mode of taxation, and a part of the general scheme for the purpose of raising revenue with which to carry on the work of government. If profits accrue over the expense of the maintenance of the system, they go to benefit the public by lessening the general burden of taxation. The fallacy, as it seems to me, which affects the argument that the municipal corporation can be made liable for the nonuser or misuser of its power, consists in that it fails to appreciate the true nature of the function which the corporation performs. It adds to its political machinery for the purpose of benefiting and of protecting its inhabitants. There is nothing connected with the work which is not of a governmental and public nature. It is in no sense a private business, and the authority to construct the works was given to it by the legislature, not

²² Supra.

²³ Edgerly v. Concord, 62 N. H. 8; Tainter v. City of Worcester, 123 Mass. 311; Maxmillan v. Mayor, etc., 62 N. Y. 160; Eastman v. Meredith, 36 N. H. 284.

at its own particular instance or application, but because it was one of the political subdivisions of the state, and, as such, was entitled to exercise it. How could it justly be said that the maintenance of the waterworks system, any more than of a fire department, was a matter of private corporate interest? Is it not for all the inhabitants and for their good and protection? No interest was designed to be subserved other than that of adding to the powers of a community carrying on a local government. If that is true, the alternative is that, being for public purposes, and for the general welfare and protection, the defendant assumed a governmental function, and comes under the sanction of the rule which exempts government from suits by citizens."

§ 347. Law Unsettled.

It will be seen from the authorities reviewed that the law is very much unsettled concerning the liability of water-supply companies to individuals, on account of their contracts with municipal corporations for the benefit of such individuals. And it is even still more chaotic in respect to the liability of municipalities on account of injury to individuals, by reason of the failure of such municipalities to efficiently perform their voluntarily assumed duty to supply water for domestic use and for extinguishing fires.

§ 348. The Relations between the Water-Supply Company and the Citizens for Whom the Municipality Contracts.

Let us examine now more particularly the relations between the water-supply company and the citizens of a municipality for whom the former has undertaken to perform certain important duties. The obligation, whatever it may be, has been assumed voluntarily, and for a consideration. The "citizen" is taxed for the benefits promised, and, besides, he is subjected to a large expense in making connection with the street mains. The payment of the tax is compulsory; making the street connection is voluntary. The first is a duty to the community. The last is the acceptance of a conditional privilege. In both cases the citizen performs in reference to a presumed consideration, which clearly is that the water-supply company shall fur-

nish him with water for domestic use and for extinguishing fires. Relying upon the promises made for his benefit to the city authorities (who were acting in this matter as his agent), he builds houses and accumulates valuable stocks of merchandise, without providing other means of protection against fire; and when fire occurs, and, through the negligence of the water-supply company, his property is destroyed, is it a sufficient answer to his petition for indemnity that they "owed him no duty"? To whom does the water company owe duty, if not to the citizen? It is he who is taxed, and who primarily pays every dollar of the revenues which it receives. The municipality, as such, has only a small interest, in comparison with that of the citizen, for whom it chiefly acts in the matter. I think that the rule here applies, "One for whose benefit a promise is made will have a right of action, although the promise is made to another." While the consideration moves directly from the municipality, and remotely and primarily from the citizen, the act of the municipality is chiefly fiduciary. It would be repugnant to every sound rule of law and every principle of business ethics to say that in a case of this kind the citizen is a stranger to the consideration.

The court of appeals of Kentucky, in *Paducah Lumber Co. v. Paducah Water-Supply Co.*,²⁴ said: "But we think, if there be in fact consideration for a promise or engagement made for the benefit of the person who sues, it is not essential for it to have passed directly from him to the person sued. * * * This court has held the doctrine well settled that a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him." We quote again from the same court in the same case: "Conceding, as must be done, the existence of the alleged power of the city of Paducah, under its charter, to enter into a contract with another for the construction and operation of waterworks, the right and duty also attached to make it for the personal benefit of the inhabitants within its corporate limits; for supply of water in a city for domestic and manufacturing purposes, and as a safeguard against fire, is always, in such cases, the main inducement, the need of the municipal corporation itself for water supply being comparatively little. * * * It thus follows that if

²⁴ 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249.

the city * * * had power to make the contract, as well for the benefit of its several inhabitants as for merely municipal purposes, and did so make it, appellant, being the real party in interest, because the owner of the property destroyed, has the right to prosecute the action in his own name." That case was again before the court on a rehearing, and in a further opinion the court said: "It is too plain for discussion that the city of Paducah had the power and did make the contract for the benefit of its inhabitants, and consequently each of them has a right to sue and recover for an injury caused to him by breach of it. * * * Appellee did not covenant to prevent occurrences of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against fire, and consequently does not, in any sense, occupy the attitude of an insurer."

CHAPTER XXII.

WAIVER AND ESTOPPEL.

- § 349. Distinction between Waiver and Estoppel.
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363. Defenses being Unknown When Sale Takes Place, There can be No Waiver.
364. Waiver is not Necessarily Irrevocable.
365. The Person Who It is Claimed has Waived a Right must be Shown to have Had the Power to Do So.
366. Conclusions.

§ 349. Distinction between Waiver and Estoppel.

Waiver is the voluntary relinquishment of a known right, and may either be expressed or implied.¹ The rights surrendered must be

¹ "Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of such intent." *Findeisen v. Insurance Co.*, 57 Vt. 520; *Dale v. Insurance Co.*, 95 Tenn. 38, 31 S. W. 266.

"Waiver is essentially a matter of intention, and cannot arise out of acts done in ignorance of material facts; and its proof is inadequate, unless it is shown that the insurer knew of the right of forfeiture at the time of doing the act." *Freedman v. Fire Ass'n*, 168 Pa. St. 249, 32 Atl. 39.

known; otherwise, there can be no intention, without which waiver will not arise. The distinction between waiver and estoppel is often more a matter of form than substance, and frequently the courts are found using both terms as signifying the same thing. Bigelow has defined "estoppel" as follows: "A party who negligently stands by and allows another to contract on the faith and understanding of a fact which he can contradict may not afterwards dispute the fact in an action between himself and the person whom he has assisted in deceiving."

The same principle of law has been formulated with much force and terseness by another in the often-quoted declaration that, "where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to keep silent."²

§ 350. What is Estoppel.

Estoppel is allowed in order to prevent fraud, and to preserve equities that would otherwise be sacrificed to cunning and trickery. Estoppel can be available only to him who has been misled to his injury. Under the insurance contract, estoppel most frequently arises in connection with some material fact which has been disclosed at the time the terms of the contract were agreed upon, but to which, through negligence or design, there has been a failure to give proper expression in the policy. To illustrate, suppose the policy contained a condition that, "if the property insured was incumbered, it must be so represented to the company, and indorsed on the policy; otherwise, it would be void." And suppose, too, it should appear after a loss that the property was incumbered, and that the fact had been dis-

² In *Turnbull v. Insurance Co.*, 34 Atl. 875, the Maryland court defined estoppel as follows: "The doctrine of equitable estoppels is this: Where one party has by his representations or his conduct induced the other party to give him an advantage which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage. It can only be relied on by a party who has been misled to his injury." *Alexander v. Walter*, 8 Gill (Md.) 241; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 514; *Hardy v. Bank*, 51 Md. 562; *Hurt v. Riffe*, 11 Fed. 790; *Leather Manuf'rs Nat. Bank v. Morgan*, 117 U. S. 108, 6 Sup. Ct. 657.

closed to the agent of the company who negotiated the insurance and issued the policy, but who had failed to make the required indorsement. The courts will admit parol testimony to show that the agent had knowledge of the incumbrance, and will estop the company from urging the incumbrance as a defense to a suit on the policy.³ Estoppel will be created only in reference to some existing fact, something that has been performed or being at the time executed. It must be fixed and certain, not subject to any contingencies, or to be changed or modified by the will of the parties concerned, or on account of the circumstances by which they may be influenced or controlled; hence a statement or recital of intentions—something that is thereafter to be done or performed—cannot create an estoppel.

To again illustrate, take the hypothetical case before mentioned, with this change: The person applying for insurance states to the agent his intention to procure a loan and to give security by placing a mortgage on the property to be insured. The agent, we will suppose, assents to this arrangement, but omits to indorse the policy or to otherwise express the fact in the written contract. Should the property be subsequently incumbered, the insurer will not be estopped from setting up such incumbrance as a defense to a suit on the policy. The representation of an intention or a purpose to be executed in the indefinite future is subject to contingencies, and a matter too uncertain to be the basis of estoppel.⁴

§ 351. When Estoppel will Arise.

Any fact coming to the knowledge of the company, at the time negotiations for the insurance are consummated, that would render the policy void by its own terms, the insurer will be deemed to have consented to, and be estopped from urging afterwards as a defense

³ *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615; *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475; *Steele v. Insurance Co.*, 93 Mich. 81, 53 N. W. 514; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Mix v. Insurance Co.* (Pa. Sup.) 32 Atl. 460; *Dowling v. Insurance Co.* (Wis.) 65 N. W. 738; *Goode v. Insurance Co.* (Va.) 23 S. E. 744; *Goss v. Insurance Co.* (Wis.) 65 N. W. 1036.

⁴ *Bigelow, Estop.* (5th Ed.) 574; *Langdon v. Doud*, 10 Allen (Mass.) 433, *Brightman v. Hicks*, 108 Mass. 246; *White v. Ashton*, 51 N. Y. 280.

in a suit on the policy.⁵ The courts will not permit an insurer, after receiving the premium for an insurance, to deny liability on account of facts which were disclosed to it at the time the contract was entered into. It is not contended, of course, that it is the duty of the insurer to speak in the absence of knowledge, or unless notice has been given of the facts creating forfeitures. Silence, too, it has been held, must not only be misleading, but it must actually have misled.⁶

Judge Cooley defines waiver as "an election of a party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon."

§ 352. Denial of Liability a Waiver of Proofs.

The proofs of loss required by the policy will be waived if the insurer denies liability.⁷ This, we think, is more properly estoppel than waiver. The reasoning of the courts has been that when the insurer repudiates the claim, and declines, without qualification, to pay the loss, proofs are unnecessary, and cannot be required. In a case of this kind it is not easy to discover any of the distinctive elements of a waiver. There is no voluntary surrender of a right. There may be no intention to relinquish anything. On the contrary, the formal and preliminary proofs which the policy provides for may

⁵ *Brink v. Insurance Co.*, 49 Vt. 442; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Hough v. Insurance Co.*, 29 Conn. 10.

⁶ Mere silence does not constitute waiver or estoppel; something must have been said or some act performed to mislead the insured to his injury. *Muel-ler v. Insurance Co.*, 87 Pa. St. 399; *How v. Insurance Co.*, 80 N. Y. 32; *Findeisen v. Insurance Co.*, 57 Vt. 520, 15 Ins. Law J. 90; *Devens v. Insurance Co.*, 83 N. Y. 168.

There will be no estoppel, unless the insured has been deceived in some manner to his injury. *Boyd v. Insurance Co.*, 16 S. W. 470, 90 Tenn. 212, and 20 Ins. Law J. 652; *Insurance Co. v. Norton*, 96 U. S. 234; *Titus v. Insurance Co.*, 81 N. Y. 410.

⁷ *Lum v. Insurance Co. (Mich.)* 62 N. W. 562; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Caledonian Ins. Co. v. Traub*, 80 Md. 214, 30 Atl. 904; *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865; *Bloom v. Insurance Co. (Iowa)* 62 N. W. 810; *McCormick v. Insurance Co.*, 163 Pa. St. 184, 29 Atl. 747; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 587, 62 N. W. 877.

be desired for excellent reasons. They might, and sometimes no doubt would, furnish important information that possibly would change the insurer's views as to the question of his liability. This advantage, therefore, which the insurer has stipulated for, and made a condition precedent, he does not "voluntarily forego"; but when he believes, as is frequently the case, that good grounds exist to excuse payment, and denies liability for that reason, the courts will not compel the insured to furnish proofs preliminary to a right of action. If proofs are demanded by the insurer, any defense under the policy of which it has knowledge when making such demand will be deemed to have been waived.⁸ So, too, if proofs are required to be furnished within any specified time, as 30 or 60 days, and, a default occurring, the insurer subsequently, by word or act, in any manner recognizes the continued validity of the claim, there will be a waiver of the condition, making it obligatory to furnish proofs within the time mentioned. If proofs are not served in time, it will be fatal to recovery, unless they are waived; and, when coming too late, it is not the duty of the insurer to inform the claimant of the fact. Silence on his part under such circumstances will in no way prejudice the rights of the insured. There is nothing that he can then do to cure the default.⁹ Speech could serve no useful purpose, and that which is unnecessary may not be required. There have been a few departures from this rule, and in some states it is held that to receive proof in silence, when coming too late, is a waiver of

⁸ *Manufacturers' & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553; *West Coast Lumber Co. v. State Inv. & Ins. Co.*, 98 Cal. 502, 33 Pac. 258; *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475; *Dohlantry v. Insurance Co.*, 83 Wis. 181, 53 N. W. 448; *Merchants' Ins. Co. of Newark v. Gibbs*, 56 N. J. Law, 679, 29 Atl. 485; *Bloom v. Insurance Co. (Iowa)* 62 N. W. 810; *McGonigle v. Insurance Co.*, 167 Pa. St. 364, 31 Atl. 626; *American Fire Ins. Co. v. First Nat. Bank of Vicksburg (Miss.)* 18 South. 931; *Dick v. Insurance Co. (Wis.)* 65 N. W. 742.

⁹ *Massé v. Insurance Co.*, 22 L. C. Jur. 124; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Bell v. Insurance Co.*, 19 Hun (N. Y.) 238; *Beatty v. Insurance Co.*, 66 Pa. St. 9; *Guernsey v. Insurance Co.*, 17 Minn. 104 (Gil. 83); *Brink v. Insurance Co.*, 70 N. Y. 593; *Blossom v. Insurance Co.*, 64 N. Y. 162, 166; *Carey v. Insurance Co.*, 171 Pa. St. 204, 33 Atl. 185; *Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 640, 42 N. E. 290; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606.

the forfeiture.¹⁰ Waiver will not exist where there is no intent, and where no one has been misled to his injury.

§ 353. When Proofs are Deficient in Matter or Bad in Form, Objection should be Promptly Made to Save Waiver of Defect.

But when proofs are furnished within time, but are objectionable in form or deficient in matter, the insurer should without unreasonable delay inform the claimant in what particulars the proofs are unsatisfactory. Failing to do so, he will be estopped from showing that the proofs were insufficient on trial of the case, should suit be brought to recover on the policy.¹¹ When proofs are defective in more than one particular, the objections returned by the company should state distinctly each point respecting which further information is desired; otherwise, it will be presumed that the proofs are satisfactory in regard to all matters that are not specially pointed out. When a forfeiture is known to exist from any cause, and the insurer afterwards requires the insured to perform any service, such as furnishing proofs of loss or plans and specifications, by which he is caused trouble and expense, the right to subsequently insist upon the forfeiture will be waived.¹² To this general proposition

¹⁰ Weiss v. Insurance Co., 148 Pa. St. 349, 23 Atl. 991.

¹¹ Gould v. Insurance Co., 134 Pa. St. 570, 19 Atl. 793; American Cent. Ins. Co. v. Brown, 29 Ill. App. 602; Smith v. Insurance Co., 47 Hun (N. Y.) 30; Parks v. Insurance Co., 26 Mo. App. 537; German-American Ins. Co. v. Hocking, 115 Pa. St. 398, 8 Atl. 586; Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. 139, and 16 Ins. Law J. 831; Liverpool, London & Globe Ins. Co. v. Sorsby, 60 Miss. 302; Welsh v. Assurance Corp., 151 Pa. St. 607, 25 Atl. 142; Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597; Home Fire Ins. Co. of Omaha v. Hammang, 44 Neb. 566, 62 N. W. 883.

¹² Insured was in default in respect to time for filing proof, and the insurer might have claimed a forfeiture. Instead, it required claimant to submit to sworn examination. Held, that this was recognition of liability, and the default was waived. Enos v. Insurance Co., 4 S. D. 639, 57 N. W. 919.

Demanding arbitration is a waiver of default in furnishing proofs. Walker v. Insurance Co., 51 Kan. 725, 33 Pac. 597; Fritz v. Insurance Co. (Pa. Sup.) 26 Atl. 14; McGonigle v. Insurance Co., 167 Pa. St. 364, 31 Atl. 626; Eagle Fire Co. of New York v. Globe Loan & Trust Co., 44 Neb. 380, 62 N. W. 895.

there may be some exceptions, as in regard to arbitration, when that mode of determining the question of loss is provided for in the policy. When doubt exists as to the liability of the insurer, it is frequently desirable to settle at once to what extent the property insured has sustained damage. Delay might often result in much inconvenience to the parties, and sometimes, too, an additional loss to the property covered. It is provided, therefore, in most forms of the insurance contract, that this one matter may be settled by arbitration, without reference to any other questions under the terms of the policy affecting the liability of the insurer. Hence arbitration may generally be demanded without any implied acknowledgment of the validity of the policy, and without waiving any of the defenses upon which the insurer may rely to defeat recovery. The urgent necessity of prompt action in repairing buildings, and in handling merchandise that has sustained damage from water or exposure, has led to special stipulations in the policy, permitting the insurer to require that the question of the amount of loss may be adjusted without entering upon any discussion concerning other matters within the terms of the policy, or without in any manner committing the insurer as to its validity, or either party as to their respective rights.

Under a formal rule, the supreme court of the United States has defined "waiver" as follows: "Any agreement, declaration, or course of action on the part of the insurance company which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon a forfeiture which, by the express terms of the contract, might be claimed." There can, however, be no rule of universal application; each case must be determined by the circumstances present and the character of the right to be waived.

§ 354. Waiver of Notice of Loss.

Where policies provide that notice of loss shall be given in writing, and the company has learned of the loss in some other manner, and sent its adjuster to the location of the fire, who proceeded to make investigations, it has been frequently held that the formal

and written notice was waived.¹³ So, too, when the local agent, who has no authority in respect to the adjustment of claims, being present at the fire, or otherwise becoming apprised of the fact, either at the request of the insured or on his own motion sends written notice to the company of the loss, it has been held that further notice was unnecessary. If proofs are declined because offered too late, it will not be a waiver of other defenses known, although they are not mentioned and specially reserved at the time. The insurer will not always be compelled to disclose his reasons for withholding payment. Where there is apparent bad faith on the part of the claimant, or complications of a fraudulent character, concealment may often be in the interests of justice and law. While the insurer may not pursue such course as will mislead the insured either to do or to forbear doing the things that will prejudice his rights, there is no duty resting upon the insurance company to furnish the policy holder such legal advice as will enable him to perform his own duties in good faith and in an intelligent manner.

In the case of *Tufts v. McClure*,¹⁴ the plaintiff had sold to the defendant merchandise to be delivered within a reasonable time. When, after some delay, the goods were tendered, the defendant declined to receive them, for the reason that they were not satisfactory in quality. Suit was brought, and it was held that, notwithstanding the goods were refused on other grounds, the purchaser might show that the offer to deliver was not made in time.

§ 355. In Regard to Waiver of Proofs of Loss.

In *Brink v. Hanover Fire Ins. Co.*¹⁵ the court held that, when proofs were presented too late to be in compliance with the requirements of the policy, the company could not make the default available as a defense, unless it should decline to receive them on that ground.¹⁶ This decision, while emanating from a court of much

¹³ *Killips v. Insurance Co.*, 28 Wis. 472; *Insurance Co. of North America v. McDowell*, 50 Ill. 120; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342; *Kendall v. Insurance Co.*, 2 Thomp. & C. 375, 58 N. Y. 682.

¹⁴ 40 Iowa, 317.

¹⁵ 80 N. Y. 108.

¹⁶ This decision not sustained by the weight of authority. See note 9.

distinction on account of its learning and ability, is not supported by good reason, nor by the weight of contemporaneous authority. When proofs, however, are refused because they are unsatisfactory in form and substance, the particular grounds of objection must be stated, and any grounds of refusal not specially mentioned will be deemed to be waived. When the insurer intends to insist upon defects in the proofs, he must clearly express such intention promptly, in order to afford the claimant an opportunity to correct them.¹⁷

§ 356. Who may Waive Policy Conditions.

What conduct on the part of the insurer will create waiver is often less difficult of determination than whether the person acting in any particular relation has been charged with sufficient authority to make him competent, by his voluntary act or word, to relinquish any right of the company by waiver or estoppel. A corporation can speak and act only through its officers and agents. To these it is given to act in different relations, and with authority measured in reference to the special or general duties which each is to perform. The authority of its officers will no doubt, in most instances, extend to every department of its affairs,¹⁸ but upon its different classes of

¹⁷ *O'Conner v. Insurance Co.*, 31 Wis. 160; *Post v. Insurance Co.*, 43 Barb. 353; *Titus v. Insurance Co.*, 81 N. Y. 410.

But a denial of liability, for a particular reason stated, will not be a waiver of defenses not mentioned, unless silence in regard to such defenses misleads the insured, and causes him to do, or to omit doing, that which would have prevented the forfeiture, or had the effect to place him in some better position of advantage. *Welsh v. Assurance Corp.*, 151 Pa. St. 607, 25 Atl. 142.

There had been a failure to preserve the clear-space warranty, and company could have denied liability for that reason, but its denial of liability was put solely on the ground that the claimant had not entire ownership of the property insured. Held, that the breach of the clear-space warranty was waived. *McCormick v. Insurance Co.*, 163 Pa. St. 184, 29 Atl. 747; *Ayres v. Insurance Co.*, 17 Iowa, 176; *McManus v. Insurance Co.*, 6 Allen (N. B.) 314; *Home Ins. Co. v. Sorsby*, 60 Miss. 302, 12 Ins. Law J. 381; *Cayon v. Insurance Co.*, 68 Wis. 510, 32 N. W. 540; *Gould v. Insurance Co.*, 134 Pa. St. 570, 19 Atl. 793; *American Cent. Ins. Co. v. Brown*, 29 Ill. App. 602; *Parks v. Insurance Co.*, 26 Mo. App. 537.

¹⁸ The president of an insurance company has no power to dispense with the conditions of the policy. *McEvers v. Lawrence*, Hoff. Ch. (N. Y.) 172.

agents certain restrictions will generally be imposed. A small number may be possessed with plenary powers; others will be appointed to special duties, and required to act within narrow limitations. It is with this class that the insured deals in most cases. A corporation has the same right as a natural person to limit the authority of its agents, and it is only within the scope of their real or apparent authority that they can bind their principals. When a person is employed to solicit risks and take applications, to be forwarded to the company for approval, but has no authority to make a complete or binding contract of insurance, and has never been held out by his principal as having such power, he cannot waive any condition or requirement of the policy.¹⁹ It has, however, been often held that the soliciting agent is competent to do certain things in respect to his distinctive duties that will create estoppel. Any knowledge communicated to him in regard to the risk he solicits, at the time of such solicitation, will be imputed to the company. If the facts imparted to the solicitor are of such a character as, under the terms of the policy, will cause an avoidance unless disclosed, such as other insurance, defective titles, incumbrances, etc., and such facts are by him withheld from the company, the latter will be estopped from insisting on the failure of the insured to give the required notice as a defense to an action on the policy. There is a large number of authorities in support of both these propositions.²⁰

There is another class, which is usually referred to by the courts,

The president of company, by his agreements that are repugnant to policy conditions, may create estoppel. *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506.

When the president of company adjusted and promised to pay, all defenses were waived. *Eddy v. Insurance Co.*, 72 Mich. 651, 40 N. W. 775.

The secretary of company has authority to waive the written consent to changes in the risk. *Haas v. Insurance Co.*, 49 Hun, 272, 1 N. Y. Supp. 895.

¹⁹ Agents having only the power to solicit insurance, deliver policies, and collect premiums cannot waive forfeitures. *Kirkman v. Insurance Co.*, 90 Iowa, 457, 57 N. W. 952; *Hartford Fire Ins. Co. v. Small*, 14 C. C. A. 33, 66 Fed. 490.

²⁰ *Beebe v. Insurance Co.*, 25 Conn. 51; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Deitz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616; *Farmers' Ins. Co. v. Williams*, 39 Ohio St. 584, 13 Ins. Law J. 133; *Kausal v. Insurance Ass'n*, 31 Minn. 17, 16 N. W. 430, and 12 Ins. Law J. 657; *Packard v. Insurance Co.*, 77 Me. 144, 15 Ins. Law J. 475; *Smith v. Insurance Co.*, 47 Hun (N. Y.) 30.

and distinguished as "general agents." While this class is more important in respect to its duties and responsibility, and has larger liberties, its powers, nevertheless, are limited to making contracts of insurance, fixing rates, filling up and countersigning policies, and collecting premiums. Having authority to make a completed contract, they will also be presumed to have power, by agreement with the assured, to "change, alter, or modify" its terms and conditions at any time after the delivery of the contract, and after it has become binding between the parties, unless limitations are imposed of which the insured has notice. The form of policy, however, now in general use, restricts the authority of an agent, in regard to changing the terms of the insurance or waiving any of its conditions, to "written indorsement." Under policies of this form, the agent has no power to enlarge or otherwise change the obligation of the company by parol. It can only be done in the mode which the policy provides in most of the states.²¹

²¹ *Birmingham Fire Ins. Co. v. Kroeger*, 83 Pa. St. 64; *Walsh v. Insurance Co.*, 73 N. Y. 5, 7 Ins. Law J. 423; *Hankins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34; *Bowlin v. Insurance Co.*, 36 Minn. 433, 31 N. W. 859, and 16 Ins. Law J. 305; *Briggs v. Insurance Co.*, 65 Mich. 52, 31 N. W. 616; *Zimmerman v. Insurance Co.*, 77 Iowa, 685, 42 N. W. 462; *American Fire Ins. Co. v. Sisk* (Ind. App.) 36 N. E. 662.

Held, in Mississippi, that it is not competent for company to limit authority of its agents to waive conditions, except in writing. *Liverpool & London & Globe Ins. Co. v. Sheffy*, 71 Miss. 919, 16 South. 307.

"When a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority, and the consent or act of the agent not so indorsed is void." *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Baumgartel v. Insurance Co.*, 136 N. Y. 547, 32 N. E. 990; *Carey v. Insurance Co.*, 84 Wis. 80, 54 N. W. 18; *Porter v. Insurance Co.*, 160 Mass. 183, 35 N. E. 678; *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191; *Tripp v. Insurance Co. (Iowa)* 59 N. W. 1.

Held, in Kansas, that a nonwaiver clause, contained in form of policy like that of the New York standard, was too sweeping; that what a person could do in writing could also be done by parol. *Long Island Ins. Co. v. Great Western Manuf'g Co.* (Kan. App.) 42 Pac. 738; *Kahn v. Insurance Co. (Wyo.)* 34 Pac. 1059.

It rests wholly with principal to determine the extent of authority which an agent shall have. *Ermentraut v. Insurance Co. (Minn.)* 65 N. W. 635.

§ 357. Local Agents will not be Presumed to Have Authority to Waive Conditions of Policy Relating to Loss.

A local agent having authority only to insure, and not being charged with the duty of adjusting losses, cannot waive notice or proofs, or any of the conditions of the policy that have reference to matters subsequent to the loss.

In *Bush v. Westchester Fire Ins. Co.*,²² Rapallo, J., said: "It cannot be held that authority of an agent to receive proposals for insurance, and countersign and deliver policies, extends to adjusting losses, or waiving the stipulation proofs of loss, and binding the company to pay without them."²³

§ 358. Parol Agreements Inconsistent with the Terms of the Written Contract in Regard to Subsequent Performances will not be Enforced.

Evidence of a contract cannot exist partly in writing and partly in parol. The courts will presume that all prior and contemporaneous agreements are merged in the written instrument. Where the policy made out and accepted by the insured provided that it would become void if the premises thereafter became vacant, and a vacancy subsequently occurred during the term of the insurance, it was held on an action to recover under the policy that plaintiff could not plead and show by parol testimony that the defendant's agent had agreed with the plaintiff, when negotiating the insurance, that, if the premises should become vacant thereafter during the term of the policy, the

²² 63 N. Y. 531.

²³ *Van Allen v. Insurance Co.*, 64 N. Y. 469, 5 Ins. Law J. 729; *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518, and 16 Ins. Law J. 334; *Bowlin v. Insurance Co.*, supra; *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, and 17 Ins. Law J. 734; *Knudson v. Insurance Co.*, 75 Wis. 198, 43 N. W. 954; *Barre v. Insurance Co.*, 76 Iowa, 609, 41 N. W. 373.

It was held by the Texas court of civil appeals that local agent could waive proofs of loss, notwithstanding the restrictive clause of policy. *Burlington Ins. Co. v. Rivers*, 28 S. W. 453.

Local agent cannot waive proofs of loss. *Harrison v. Insurance Co.*, 59 Fed. 732.

insurance would continue valid, notwithstanding the inhibitory provision of the contract. To give legal effect to such executory agreements, in contravention of the plain terms of the written instrument, would be to set aside well-settled and important rules of law.²⁴

The agreement claimed to have been made in both of the above cases related to matters of performance in the future, but it is apparent that the contracts could not be reformed so as to afford the relief sought, as it was not claimed that they did not express accurately the agreements between the parties, so far as they expressed anything. The contention was that the contract made was partly in writing and partly in parol, and, as such, was repugnant to the rule before stated. As the subject of the parol agreements related to a future performance, estoppel would not arise.

Mr. Bigelow, in his consideration of this question, reaches a conclusion sustaining the proposition here contended for.²⁵ He says: "The representation or concealment must also in all cases have reference to a present or past state of things, for, if a party make a representation concerning something in the future, it must generally be either a mere statement of intention or opinion, uncertain in the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract."

²⁴ *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 613, 7 Ins. Law J. 228; *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137, and 16 Ins. Law J. 713.

A different rule has been sanctioned in Kentucky. The policy, by written indorsement, permitted 30 days for mechanics to finish the building; and the court allowed the introduction of proofs, showing contemporaneous oral agreement that the insured could have all the time he wanted to employ mechanics to complete building. *Queen Ins. Co. v. Kline* (Ky.) 32 S. W. 214.

In New Jersey a written contract cannot be changed by parol testimony, coincident with its inception. *Bennett v. Insurance Co.*, 55 N. J. Law, 377, 27 Atl. 641.

So, also, in Virginia. *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

And in Texas a written contract cannot be varied or controlled by antecedent or contemporaneous agreements. *Union Cent. Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 455, 22 S. W. 117. And to same effect is *Walton v. Insurance Co.*, 116 N. Y. 326, 22 N. E. 443; *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77; *Phenix Ins. Co. v. Wilcox & Gibbs Guano Co.*, 13 C. C. A. 88, 65 Fed., at page 730.

²⁵ *Bigelow, Estop.* (2d Ed.) 438.

So, also, in the case of *Insurance Co. v. Mowry*.²⁶ There the effort was made to defeat a forfeiture by estoppel. The court, by Justice Swayne, insisted upon the important distinction between a representation as to a present or past state of things and an agreement or representation as to future action. We quote: "An estoppel cannot arise from a promise as to future action, with respect to a right to be acquired upon an agreement not yet made. * * * But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulation in their agreements, reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent."

And thus, too, in *Walton v. Agricultural Ins. Co.*,²⁷ the agent who took the application agreed with the insured that the title to the property might thereafter be changed without prejudice to his rights. The court held that such agreement was nugatory as against the prohibition contained in the policy.

In *Kimball v. Aetna Ins. Co.*,²⁸ the building covered was vacant at the time the policy was issued, but the assured agreed orally with the agent that it should thereafter be occupied. This was never done, and, a loss occurring, it was held that the parol agreement to have the property occupied was no defense to recovery. The court said: "An oral representation as to a future fact, honestly made, can have no effect; for, if it is a mere statement or expectation, subsequent disappointment will not prove that it was untrue, and, if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract."²⁹

²⁶ 96 U. S. 544.

²⁷ 116 N. Y. 317, 22 N. E. 443.

²⁸ 9 Allen (Mass.) 540, 543.

²⁹ *White v. Ashton*, 51 N. Y. 280; *Langdon v. Doud*, 10 Allen (Mass.) 433;

§ 359. Offer of Compromise Pending Negotiations for Settlement is not a Waiver of Technical Defenses.

In *Richards v. Continental Ins. Co.*³⁰ the policy had clearly been avoided on account of the property insured having become vacant without notice to and consent of the insurer, but the plaintiff sought to defeat a forfeiture on the ground of waiver. It appears that, on receiving notice of the loss, the adjuster of the defendant company for Michigan met plaintiff by appointment, and the fact of the vacancy was then explained. The plaintiff testified on the trial of the case that the adjuster, on being informed of the removal of the tenant, said: "We consider it vacant, but we are not going to be technical about the matter. We are satisfied that you had the loss, and will pay you \$450, and cancel your policy if you will take it." The court said: "The policy was for \$900, and the property was worth considerably more than that. The plaintiff declined to accept the proposition, when the adjuster again said: 'Well, think of it two or three weeks, and, any time you conclude to accept this offer, write to me, and I will cancel your policy, and pay you \$450.' This did not constitute a waiver. A man may, without prejudice to his rights, offer to buy peace. This offer to compromise was inadmissible in any aspect of the case. The solemn and deliberate

Brightman v. Hicks, 108 Mass. 246; *Allen v. Rundle*, 50 Conn. 9; *Turnipseed v. Hudson*, 50 Miss. 429.

Parol negotiations are all merged in the contract, and are not to be controlled or affected by parol evidence of the understandings of the parties. *Union Nat. Bank of Oshkosh v. German Ins. Co.*, 18 C. C. A. 203, 71 Fed. 473. See authorities cited.

There was attached to the policy a clause requiring the insured to keep books of account. After the occurrence of a fire, it was ascertained that no "books" had been "kept," and testimony was permitted by the trial court to show that the agent who negotiated the insurance and wrote the policy informed the insured at that time that the "keeping of books would be unnecessary." Held, that testimony concerning oral contemporaneous declarations must be disregarded. The court said: "The appellee undertook that he would keep a set of books, showing a complete record of his business. He failed to do so, and, by the terms of his contract, he cannot recover." *Germania Ins. Co. v. Bromwell* (Ark.) 34 S. W. 83.

³⁰ 47 N. W. 350, 83 Mich. 508, and 20 Ins. Law J. 366.

contracts of parties cannot be set aside by such offers. The language used by the adjuster contains no admission of liability on the part of defendant. Plaintiff's rights under the contract were not prejudiced or injured by this conversation. He lost nothing by it, and was not thereby induced to forego any of his rights under the policy."

This appears to the writer as being an excellent test of waiver. If what has been said or done by one party does not induce the other party to act differently in respect to the matter than he otherwise would have done, he has not been misled to his injury, and no waiver will result.³¹

We find an instructive discussion of the principles of waiver and estoppel, and their application under circumstances that frequently arise, by the supreme court of Tennessee in *Boyd v. Vanderbilt Ins. Co.*³² The policy in that suit expressed on its face that the dwelling insured was occupied by a tenant at the time the policy was issued. The house had, in fact, been vacant for more than a month, and so continued until it was burned, about a year afterwards. The fact that the premises were unoccupied at the writing of the policy was not disclosed to the company, but Boyd, the insured, several months later, informed the secretary of the insuring company that no one was living in the house, and the secretary replied, "That is all right." The court held that the stipulation or statement expressed on the face of the policy, that "the dwelling was occupied by a tenant," was a warranty, and, unless literally true, the insurer would not be liable for the loss; but the plaintiff insisted that the subsequent notification to the secretary that the building was then vacant, and his assent thereto, were a waiver of the forfeiture. Justice Lurton, who wrote the opinion of the court, pointed out the very clear distinction between a waiver of the subsequent vacancy and

³¹ *Welsh v. Assurance Corp.*, 151 Pa. St. 607, 25 Atl. 142; *Weidert v. Insurance Co.*, 19 Or. 261, 24 Pac. 242; *Harrison v. Insurance Co.*, 67 Fed. 577; *Merchants' Mut. Ins. Co. v. Lacroix*, 45 Tex. 158.

In this case it was held that a waiver could not be insisted upon, unless there was consideration for the abandonment of the right. And this appears to have been the views of the New York court when deciding *Ripley v. Insurance Co.*, 30 N. Y. 136.

³² 90 Tenn. 212, 16 S. W. 470.

that which existed at the inception of the contract; that, while the nonoccupancy had been continuous, the warranty related to the point of time when the policy was issued; and that the waiver by the secretary, which related to a vacancy which existed some months later, did not include the vacancy which existed at the time the policy was issued, of which no notice had ever been given. The court said: "A consent to the vacancy occurring during the life of the policy would not be a waiver of the warranty that the premises were occupied at the inception of the contract. * * * Notice of such vacancy and consent thereto would only operate to waive the clause of the policy forfeiting it for a vacancy without consent during the life of the policy. This contract never had any validity, and life could not be given unless the company, with full notice, consented to its continuance." The defendant in this case, it appears, with full knowledge of the breach of warranty, demanded of the plaintiff that he furnish the customary proofs of loss; and the court held that this was not a waiver of the warranty. It said: "The policy required that the assured should furnish the evidence of his loss, and it required plans and specifications of the building destroyed. The requirement of such evidence, even if it did involve expense, is not a waiver of other defenses. The cases of *Insurance Co. v. Norton*³³ and *Titus v. Glens Falls Ins. Co.*,³⁴ cited by counsel for appellants, were cases involving conduct after forfeiture, but before the loss had occurred. They do not support the assignment. The other cases cited are not accessible. It is inconceivable, though, that they should be authority for the position that if the insurer, after loss, requires proofs of loss, it thereby waives all right to set up as a defense that it is not liable by reason of the fact that it never had a valid contract at all. 'Waiver' is generally but another term for 'estoppel.' There can be no estoppel where the assured has not been misled to his prejudice. The defense was one to the whole demand. Its assertion might waive defects in proofs or want of notice, but the demand of estimates of loss in no way misled plaintiff, for he knew that not only was all liability denied, but that, if any existed, the amount of his demand was contested."

This case is referred to on account of the excellent illustration it

³³ 96 U. S. 234.

³⁴ 81 N. Y. 410.

presents and the distinction it points out concerning certain important elements of waiver which are often only obscurely comprehended. There are numerous cases where it has been held that a denial of liability was a waiver of proofs, and there are also many cases where a demand for proofs of loss has been held to be a waiver of any defenses of which the insurer had knowledge; but these questions, it should be carefully observed, were not considered and decided by the Tennessee court in the case under review. The Vanderbilt Insurance Company at the same time denied liability, and demanded proofs of the loss Boyd claimed to have sustained. In denying liability, it cannot be presumed to have waived proofs, because it expressly demanded that they should be furnished; and, in requiring proofs, there was no implied waiver of the warranty, as the company had distinctly stated it should rely on that defense. We think, therefore, that the court was right in its conclusion that the insurer could avail itself of both the defense of breach of warranty and the default in making proofs. The plaintiff had not been misled, and could not complain that his rights had in any manner been prejudiced. Had the company been silent in regard to the breach of warranty, and demanded proofs of loss, the court might and probably would have held an implied waiver of the warranty; but the insurer cannot be held to imply what it expressly disclaims.

**§ 360. When Accepting Payment of Premiums after a
Loss will not be a Waiver of the Right
to Insist on Forfeitures.**

The supreme court of Illinois, in *Carlock v. Phoenix Ins. Co.*,³⁵ discusses the partial payment of a premium note in respect to the question of waiver, under circumstances which have not been presented in any case before brought to our attention.

The plaintiff had accepted a policy in the defendant company, and for the premium, \$62, had given his note. The policy contained a provision that, "in case the assured fails to pay the premium note * * * at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note * * *

³⁵ 138 Ill. 210, 28 N. E. 53.

remains unpaid after maturity. * * * The payment of the premium note, however, revives the policy, and makes it good for the balance of its term." The policy also provided in proper language that only the general agent of the company at Chicago had power to waive any of its conditions, and that he could do so only in writing.

The time for paying the note had been extended several times, but it was overdue and not wholly paid when a loss occurred. The contention of the plaintiff was that the defendant had waived its right to declare a forfeiture under the terms of the policy, by reason of having accepted partial payments on the note after maturity. Scholfield, C. J., said: "Here the failure to pay the note at its maturity was not an absolute forfeiture of the rights of the insured under the policy, but a suspension simply of those rights until full payment of the note, by which act they would be revived in all their original force. The receipt of partial payment of the note waived nothing, for the insured had a right to make payment of the note by partial payments from time to time, and thus to revive the liability of the insurer upon the policy, and what he had a right to pay it was the duty of the insurer to receive."³⁶

§ 361. Revival of Void Contract.

When a forfeiture has occurred because of a breach of warranty or the violation of a policy condition, there will continue no obligation on the part of the insurer, unless it can be shown that the forfeiture has been waived. When the insurer has been absolved and wholly set free, it can be held to pay a loss which may subsequently occur only on a new promise, supported by another and independent consideration.³⁷ While these propositions are too well understood to

³⁶ 138 Ill. 215, 28 N. E. 54.

³⁷ "The contract being once terminated, it could not be revived without the consent of both parties." *Moore v. Insurance Co.*, 62 N. H. 240; *Mead v. Insurance Co.*, 7 N. Y. 530, 535, 536; *Lyman v. Insurance Co.*, 14 Allen (Mass.) 329, 335; *Merriam v. Insurance Co.*, 21 Pick. (Mass.) 162; *Jennings v. Insurance Co.*, 2 Denio (N. Y.) 81; *Shepherd v. Insurance Co.*, 38 N. H. 232, 239, 240; *Poor v. Insurance Co.*, 125 Mass. 274; *Alexander v. Insurance Co.*, 66 N. Y. 464, 468; *Sleeper v. Insurance Co.*, 56 N. H. 401; *Hill v. Insurance Co.*, 58 N. H. 82; *Fabyan v. Insurance Co.*, 33 N. H. 203; *Glen v. Lewis*, 8 Exch. 607.

need stating, there is an important distinction between a waiver and a promise to continue the contract, which is frequently lost sight of. To relieve this matter from nebulousity, we will offer an illustration: Brown, we will suppose, is insured for \$1,000 on a dwelling house. The policy contains a stipulation that it shall "be void if the insured property shall thereafter become incumbered without the consent of the company." The policy also expresses the fact that "no agent has power to waive any of its conditions, except by written indorsement thereon." After the delivery of the policy, the property is mortgaged; and the agent, being notified, informs Brown that the incumbrance will not affect the liability of the company, that the policy shall continue valid, but omits to make the required written indorsement. It has been held by nearly all courts that such action on the part of the agent does not have the effect to waive the condition of the policy, discharging the insurer when the property becomes incumbered, because he has power to waive forfeitures only in a manner particularly designated, by a "written indorsement." (See chapter on Limitation of Agent's Authority). But we will assume that the agent with whom Brown was dealing had authority to make completed contracts of insurance, and in that respect could bind his company by parol. Would this fact in any essential manner affect the liability of the company? Would the promise made by the agent, that the "policy shall continue valid," change the relation of parties? The answer to this question will depend upon whether the promise of the agent rests upon a valid consideration. If it does not, then it is void so far as the company is concerned.

May ³⁸ says: "Nothing can revive a void contract, short of a new contract, on valid considerations, or conduct amounting to estoppel."

This proposition is supported by the decision of the court in the case of *New York Cent. Ins. Co. v. Watson*.³⁹ We quote from the syllabus of the case, as follows: "Nothing can revive a forfeited policy but a new contract, on valid considerations, or such conduct as, by misleading the insured to their prejudice, would operate as an estoppel."

In *Brink v. Hanover Fire Ins. Co.*⁴⁰ the court says: "When the

³⁸ 1 May, Ins. § 126; Id. (New Ed.) § 70c. ³⁹ 23 Mich. 486, at page 488.

⁴⁰ 70 N. Y. 593.

assured has lost all right under the policy, and the insurer has become absolved from all liability, the assured cannot, by his own act, restore the contract or reimpose a liability upon the insurer. That can only be done by a new agreement, founded upon a new consideration."

In the hypothetical case before introduced for the purpose of illustration, Brown, who had been misled to his injury by the misrepresentations and promise of the agent, would no doubt have his remedy against him by an action at law.

§ 362. When Sale of Damaged Grain is a Waiver of Defenses.

On the burning of a mill and elevator, there was saved in a damaged condition a quantity of grain that seemed to require immediate handling, to prevent further injury. At that time it was unknown whether this salvage would be for the benefit of the underwriter or the insured, and the adjusters, representing all the companies involved in the disaster, urged that the grain be sold at once for the account of whom it might concern. This course of action was reluctantly consented to by the insured. After the sale, but before payment had been made of the purchase money, the adjusters learned for the first time that the property was incumbered by chattel mortgage, and they immediately denied liability, and refused to proceed further with the adjustment. No effort was made to restore the damaged grain, or to collect and pay over to the insured the money for which it had been sold. Presumably, the grain could not have been returned, as it had already been sold by mutual agreement. If there had been a forfeiture because of the chattel mortgage, the underwriters had no interest in the salvage, and, it would seem, were burdened with no duty in respect to collecting the money due from the purchaser. This money, as the evidence showed, was some months afterwards tendered to the insured, and refused by him. The court held that the insurer was estopped from denying liability on account of the incumbrance, because it had not acted promptly in restoring the grain, or in collecting and paying into the insured's hands the money for which it was sold.

§ 363. Defenses being Unknown When the Sale Took Place, There could be No Waiver.

This decision is certainly illogical and I think wrong in both its legal and business aspects. As we have already explained, the grain was sold by agreement of all the parties, at a time when the insurers knew nothing of the forfeiture, and before there had been any computation of the loss. The action taken in respect to the salvage was not unusual, and, from the circumstances, appears to have been prudent, and to prevent further loss. If the insurers were involved in this relation, it was because the insured had withheld the important fact that he had broken his warranty in regard to the chattel mortgage. If any one must suffer by reason of the complication, it should be he whose concealment of the forfeiture had misled the insurer to his injury. The underwriters were justified in proceeding on the presumption that the insured had performed the conditions of his contract in good faith.⁴¹

§ 364. Waiver is not Necessarily Irrevocable.

Waiver is not necessarily irrevocable. Whether it is or not will depend upon the circumstances in each particular case. If one abandons a right without consideration, he may resume it again at his pleasure, providing the abandonment shall not be a snare to others, having relations to the same matter, causing them to do, or to omit doing, in a different manner or measure than would otherwise have been the case. In the assertion or denying of a right, we do not need to consider the stranger; to him we owe no duty. But it is otherwise with him who is interrelated in the affair; he may not be entangled or misled. If we voluntarily waive a right, and, in doing so, cause another, with whom we are involved, to reasonably suppose that he may proceed as though the right no longer existed, we may not afterwards recall our waiver, to the confusion of him whom we had led to believe that the right had been permanently discarded. We may do with our rights the same as with any other class of

⁴¹ First Nat. Bank of Devil's Lake v. Manchester Fire Assur. Co. (Minn.) 66 N. W. 136.

property,—use them for our own convenience and happiness, but never to the injury of another. When the insurance company waives a right voluntarily and without consideration, such waiver may be recalled at its convenience, unless the waiver has caused the insured to adopt some course of action that he would not have adopted, and thus will be prejudiced in his rights by the recalling of the waiver.⁴²

§ 365. It must be Shown that the Person Who It is Claimed has Waived a Right had the Power to Do So.

When it is claimed that a right has been waived, it will rest upon the party pleading the waiver to show, by competent testimony, that

⁴² Hahn v. Assurance Co., 23 Or. 576, 32 Pac. 683.

In the case last cited, the adjuster of the company, after the fire, visited the location of the loss, examined somewhat the circumstances of the fire, and, on account of some changes in the situation of the risk, denied liability. By reason of this action, proofs were waived. The adjuster reported to the general agent replied that he "begged leave to suggest that Mr. Hahn present for some time, when the insured's attorney wrote the general agent, requesting that he state expressly why payment was refused. To this letter the general agent replied that he "begged leave to suggest that Mr. Hahn present to this office proof of loss claimed by him, * * * in strict accord with the printed terms of the policy, and thereupon we will give the whole matter our full attention."

The court held that the legal effect of this letter was to withdraw the waiver. It said: "It is clear from the letter of the general agent that the defendant either did not understand that the proof of loss had been waived, or, if it had been waived by the conduct and declaration of its agents, that the defendant intended to withdraw the conclusion of waiver inferred from such conduct and declarations; nor do counsel now, nor did the trial court, question the right of the defendant to withdraw such conclusions. In its charge, the trial court expressly instructs the jury 'that the company had the right to withdraw its conclusion, if made within sixty days.' * * * There was plenty of time before the expiration of sixty days for the plaintiff to furnish the proof of loss, and this requirement is admitted to be a prerequisite to the plaintiff's right of recovery, unless the same had been waived by the defendant."

The court then expresses its conclusion that the proofs had been waived, but, by the action taken by the general agent, waiver had been recalled, and that it then became the duty of the insured to furnish defendant proof of loss, and, failing to do so, it could not recover.

the person who it is alleged made the waiver had the authority to do so.⁴³ This fact must be shown the same as any other that is given to a jury. The authority of an agent cannot generally be proven by the agent himself.

§ 366. Conclusions.

Waiver is sometimes the express abandonment of a right. More frequently it is implied from acts that are inconsistent with its continued assertion. When the right has been relinquished for a consideration, the waiver is irrevocable. When the abandonment is voluntary and without consideration, the right may be again resumed, if to do so will not be prejudicial to those who have been led into a course of action, in the belief that the right waived would not be again asserted.

Estoppel is the shield of justice interposed for the protection of those who have not been wise or strong enough to protect themselves. It is the special grace of the court, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud. Estoppel can be available to him only who has been misled to his injury.

A denial of liability is waiver of proofs of loss, but if the insured does not proceed to act in reference to such denial, and within a reasonable time the insurer recalls the waiver, it will then be the duty of the insured to furnish proofs, in accordance with the terms of the policy.

When proofs are specially called for, any defenses known to the insurer at the time of making such call will be waived.

When the serving of proofs within a specified time is made a condition precedent, it will be fatal to recovery if there is default.

When proofs come too late, it is not the duty of the insurer to notify the insured of the fact. He will be presumed to understand the requirements of the policy. Besides, there is nothing which he can

⁴³ It is the duty of one claiming waiver to show authority in the person who it is alleged made the waiver. *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 81; *Dryer v. Insurance Co. (Iowa)* 62 N. W. 798; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Eaton v. Insurance Co.*, 15 Ins. Law J. 762; *Feibelman v. Assurance Co. (Ala.)* 19 South. 540.

do to cure the default. Speech can serve no useful purpose, and that which cannot change the relation of parties may not be required.

If proofs are deficient in matter, or bad in form, the insured should be promptly notified of the fact, having his attention called to each particular point in respect to which they are incomplete or unsatisfactory. General statement of the company's objections will not be sufficient.

As waiver is the "intentional relinquishment of a known right," it cannot result when there is an apparent or an express purpose to retain the right, as when the insurer at the same time denies liability, and calls for proofs of the loss.

When the policy has for any reason become void, it cannot be restored by waiver. Nothing less than the creating force of an affirmative agreement of the contracting parties, supported by a new consideration, will give it life.

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CHAPTER XXIII.**SETTLEMENT.**

§ 367. When Settlement is not Conclusive.

368. What is Duress.

369. Settlement will not be Set Aside, unless the Consideration is Returned.

370. A Compromise Settlement will be Sustained, in the Absence of Fraud, although Material Facts have not been Disclosed.

371. When an Adjustment, with Promise of Payment, is not Conclusive.

372. When a Compromise will be Final.

373. Conclusions.

§ 367. When Settlement is not Conclusive.

When a claim for loss is paid, the money accepted, and receipts given, the settlement will be conclusive, unless it is shown that it was procured through mistake, fraud, or duress, in which case the party wronged will not be bound. If it be the claimant who asks to have the settlement annulled, he must, within a reasonable time after ascertaining the facts upon which his claim for rescission is based, declare his purpose to repudiate the settlement, and either return or offer to return to the insurer the money received in consideration for the acquittance given.¹ It is an elementary principle that one cannot renounce a contract while retaining its benefits. Duress is such compulsion as will exclude the presumption of free consent.

¹ When the promise to pay a claim is made through mistake, the settlement without merit, and based upon no rights surrendered, or other consideration, it will not be enforced. *Christian v. Insurance Co.*, 101 Ala. 634, 14 South. 374.

When a settlement is procured by fraud, the insured will have his action on the policy by paying back to the insurer the amount received in acquittance. *Potter v. Insurance Co.*, 63 Me. 440.

When adjustment has been procured by fraud, suit cannot be maintained without returning the money. *Brown v. Insurance Co.*, 117 Mass. 479; *Home Ins. Co. v. McRichards*, 121 Ind. 121, 22 N. E. 875. See notes 7 and 8, *infra*.

It was held in *Sanford v. Insurance Co.*, 11 Wash. 653, 40 Pac. 609, that it was not necessary, before bringing suit to set aside settlement, to return the consideration.

Consent is the basis of all contracts, and, when the will is so constrained by fear on account of a threatened injury that the consent is not free, the party "consenting" will not be bound. This general proposition, however, is subject to important qualifications, as will hereafter appear. Words spoken or acts performed, which, under a given class of circumstances, would constitute duress, would be harmless and justifiable under circumstances of a different character. Physical and mental conditions are always important facts to be considered when estimating the probable resisting force of the party claiming to have been the subject of duress.

§ 368. What is Duress.

Robinson, in his *Elementary Law*,² says: "A contract entered into under a reasonable fear of injury to life or limb is invalid, and may be avoided by the contracting party at his pleasure."

In Broom's "Legal Maxims" we find many cases illustrative of the principle stated.³ He says: "When such compulsion consists in an illegal restraint of liberty, a contract entered into by reason thereof will be void. If, for instance, a man is under duress of imprisonment, or, if the imprisonment being lawful, he is subjected to undue and illegal force and privation, and in order to obtain his liberty or to avoid such illegal hardship he enters into a contract, he may allege this duress in avoidance of the contract so entered into; but an imprisonment is not deemed sufficient duress to avoid a contract obtained through the medium of its coercion if the party was in proper custody, under the regular process of a court of competent jurisdiction. This distinction results from the rule of law, '*Executio juris non habet injuriam*.'"

When one secures an advantage of another by violence or by such intimidation as will compel assent, when otherwise assent would have been refused, the courts will afford relief to the injured party, but the pressure imposed to obtain an involuntary consent must be wrongful. A person may assert his rights with vigor, and threaten to enforce them by a suit at law, and there will be no duress. The courts favor settlements, and "the law will not consider trifles," especially

² Page 16.
(764)

³ Page 132.

when they consist of no more than angry words used by those engaged in a heated disputation concerning their rights.

Stimpson, in his work on American Statute Law,⁴ says: "It is not every degree of violence or every kind of threat that will invalidate a contract. They must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation, or fortune. The age, sex, state of health, temper, and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, must be taken into consideration."

In California, duress is the unlawful confinement of the person or of certain relatives, etc.; unlawful detention of the property of such person; confinement lawful in form, but fraudulently obtained, or unjustly harassing or oppressive.

A complaint of threats or violence will not be sustained to render a contract nugatory, if the acts or words complained of have been approved or acquiesced in after the party injured has had time to deliberate, and opportunity to ascertain his rights. He must act with reasonable diligence in repudiating the contract and demanding rescission. Legal imprisonment, even, is not duress, unless procured for an illegal purpose. Lord Coke enumerates four cases in which a man may avoid his own acts by reason of menaces,—fear of the loss of life, of liberty, of imprisonment, of reputation. But it is also true that restraint of goods, under circumstances of peculiar hardship, will avoid a contract.⁵

"If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of any measure, authorized by law and the circumstances of the case, are of this description."⁶

On the question of duress the authorities are numerous, and it will be observed that they all sustain the general rule of law, without material disagreement. The difference, when found to exist, is more in the word used than in the principle or fact intended to be ex-

⁴ Page 476.

⁵ Ripley v. Gelston, 9 Johns. (N. Y.) 201; Elliott v. Swartwout, 10 Pet. 137.

⁶ Peake, Ev. 440; Watkins v. Baird, 6 Mass. 506, for the rule at common law.

pressed. There are no exceptions to the rule declared, that, if there is duress, it is fatal to the contract.

Duress always involves compulsion; that is, the compelling another to do what otherwise he would not have done. As free consent is the basis of all contracts, so will constraint and compulsion avoid and destroy. Force is abhorrent to the law. Coercing is not, however, necessarily duress. Absolute freedom of the will will seldom be found to exist. Conduct is stimulated by motive. In the declaration of this fact the writer disclaims any intention of entering upon any discussion of polemics, or of undertaking to settle disputed points in theology. Reasons of great urgency may sometimes exist to induce the settlement of loss claims. The insured may be without shelter, or the means of procuring it, the want of a ready sum of money to meet a very pressing exigency, on the fulfillment of which depends his honor, or the success of his business venture. To make available necessities of this kind in securing an advantageous settlement might be repugnant to business morals, but it would not be duress. The insurer may even refuse payment altogether, unless specific terms are acceded to. He has a legal right to put the claimant to his remedy. It is not, therefore, sufficient if only one's necessities are practiced upon. That alone would not be "injuria." To do that would be legal. Duress, in the contemplation of the law, is an injury that is illegal, "injuria" because not "jus." "The execution of the law cannot produce injury" (in the legal sense). As appears from the cases quoted, bodily injury is such, being an unlawful trespass upon the person; and so, too, is injury to the reputation. To say that lawful coercion or restraint was duress would be to challenge the truth of the maxim, "*Executio juris non habet injuriam.*" When one avails himself of lawful means to exact that which is his own, he will not be compelled to consider the hardships that may be involved, and his act will not be duress, for all the elements of the act and its consequences are lawful.

Judge H. B. Brown, now of the United States supreme court, once defined duress to be "that degree of severity, either threatened or impending, actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness."

And again, in charging a jury, he said: "If you find that this compromise was procured by a threat of imprisonment, inducing in (766)

the mind of the plaintiff a fear of the loss of his liberty, and that the charges made by the defendant's agent were false, and known by him to be false, and that plaintiff was frightened or forced into compromise, (even) then you will be authorized to find that he consented to the settlement under threats, through consciousness of his guilt in having brought about the fire in having burned the property, then there was no legal duress, and the settlement is binding." *

In the case of *Mayhew v. Phoenix Ins. Co.*⁷ the court had under consideration the question of duress as it will be most frequently presented in insurance cases. The discussion was on a bill in equity to set aside a compromise settlement agreed upon between the plaintiff and the adjuster of the defendant company. The fraud set up was that the adjuster had misled the complainant as to his legal rights under the contract during the negotiations that had led up to the settlement; that, in fact, he induced the complainant to believe the policy contained no provision for arbitration, and that his only means of redress was at law. The court said: "The whole burden of the case, therefore, depends upon the breach of duty arising out of this confidential relation, requiring the utmost good faith in mutual dealings. * * * He [complainant] appears to have had good cause of action, and to have compromised it on terms that no high-minded business man, without strong convictions of its legal doubtfulness, ought to have made. But this, of itself, is no ground of relief, unless there has been some tangible misconduct of such nature as to amount to a breach of duty, and we think, upon the facts, that the complainant is himself chiefly responsible for his misfortune. * * * Ireton was the agent of the adverse interest, and no one of ordinary experience would suppose him likely to forego the interest of his employers. Presumably he would not be likely to stand in any different position from other persons dealing at arm's length. * * * From the first to last he displayed a somewhat hostile spirit, and complainant does not appear at any time to have been convinced that his positions were right. There is no satisfactory evidence that Ireton attempted to prevent complainant from seeking advice, and there is no good reason given why he did not obtain it. He was not among strangers, and he was aware of

* *Davis v. Insurance Co.* (Cir. Ct. E. D. Mich.), not reported.

⁷ 23 Mich. 105, 1 Ins. Law J. 450.

all the facts. It was his duty, as a man of common prudence, to seek advice from his own friends if he had not confidence in himself.

* * * We do not shut our eyes to the common fact that eagerness to settle is very often stimulated by the sort of peremptory position taken in this case, and that the domineering course is a valuable auxiliary to fraud; but the law cannot interfere to supply a lack of firmness in those who allow themselves to yield to such influences without some further element of misconduct. A man who knows, or who has the means of knowing, his rights, must, under ordinary circumstances, be expected to stand upon them. There is no legal fraud or duress, in ordinary cases, in declining to comply with a demand without litigation."

The facts here considered by the Michigan court are of a general class, such as are most frequently presented when it is sought to have a settlement rescinded; and, while there is no discussion of the elemental principles of duress, the opinion will be useful and instructive to such as are interested in knowing the legal effect given by an able court to facts such as the record of this case presents. As measured by legal standards, they fall short of establishing duress; nor even were they sufficient to make a case of fraud, although it appears conclusively that the complainant's will had been dominated and coerced by what was equivalent to a threat that, unless a compromise was agreed to, litigation would become inevitable. The clear import of this decision is that the threats and misrepresentations alleged, although effective in controlling the will of the complainant, and securing a settlement on terms of advantage to the defendant, were not unlawful; that, notwithstanding a fear was stimulated and made useful in promoting the interests of the defendant, no legal right was violated. The complainant understood that the adjuster was representing an adverse interest, and ordinary prudence forbade that he should look to him for counsel in regard to his rights under the contract. The court held that, although the complainant's will had been controlled through the fear of litigation into comprising a good cause of action, he was not, in a legal sense, "compelled."

§ 369. Settlement will not be Set Aside unless the Consideration is Returned.

One seeking the aid of the courts for a rescission of a settlement, as before stated, must show that he has returned, or offered to do so, the consideration received. Precisely the same rule applies as in the cancellation of a policy. A party will not be permitted to renounce a contract, and at the same time continue to enjoy its benefits. This has been held in numerous cases.

In *Home Ins. Co. v. Howard*⁸ the company claimed that for certain reasons it was not liable for a loss which had occurred, but by agreement with the plaintiff paid \$25 in compromise. Subsequently, becoming dissatisfied, plaintiff brought suit, and set up in his petition that the settlement and release were procured from him while laboring under physical and mental distress, by the false and fraudulent representations of defendant's agent. The court said: "The action being at law to recover upon the policy as a subsisting obligation, it follows inevitably that the contract of settlement and cancellation above set out, not being void, constitutes an insuperable barrier against recovery, so long as it is not rescinded by an offer to return the consideration paid for it. The case is not distinguishable from *Brown v. Hartford Fire Ins. Co.*⁹ In such a case as this, a recovery cannot be had upon a contract which has been released and surrendered up, in pursuance of a subsequent contract, upon which an amount has been paid as a compromise of a disputed liability upon the original obligation, so long as the subsequent contract remains unrescinded and in force. It does not alter the case that the compromise may have been brought about by fraud and misrepresentation of the defendant, or that in the end it was found that a sum largely in excess of the amount paid to settle the defendant's liability was due the plaintiff. As is said in *Gould v. Cayuga Co. Nat. Bank*, supra: 'In all actions of trover or replevin to recover the

⁸ 111 Ind. 544, 13 N. E. 103, and 17 Ins. Law J. 65. See note 1 for additional authorities.

⁹ 117 Mass. 479; *McMichael v. Kilmer*, 76 N. Y. 36; *Gould v. Bank*, 86 N. Y. 75; *Bisbee v. Ham*, 47 Me. 543; *Worley v. Moore*, 97 Ind. 15, and cases cited. See notes 1 and 7.

property parted with, and in all actions based solely upon the original relations of the parties, the plaintiff must show that he rescinded the fraudulent contract before the commencement of the action. One who has been led into a contract upon which he has recovered something of value cannot ignore the contract, however induced, and proceed in a court of law as if the relations of parties were wholly unaffected thereby. He cannot, while retaining its benefits, and thus affirming the contract, treat it as though it did not exist. He cannot treat it as good in part and void in part, but must affirm or avoid it as a whole.'”¹⁰

The court then notes the distinction between cases where all liability is denied and a payment is made in compromise, to be rid of a troublesome matter, and the compromise of a debtor with his creditor, a liability being admitted. In the latter case, where the creditor has been led into the compromise by fraud or deceit, the principle applicable to rescission does not apply. It then adds: “Where, however, one person denies any liability whatever, another may not first obtain from him what he can under an agreement to compromise, and afterwards, with the money so obtained, without avoiding that agreement, prosecute an action at law to recover as much more of the claim in dispute as he may chance to secure. Where one has been induced to compromise a claim by fraud, he can rescind by restoring or offering to restore what he has received as a consideration for the compromise. He may then maintain an action at law upon the original contract, treating the compromise as rescinded. A person thus situated may, instead of rescinding and suing at law, keep what he has received, and commence suit in equity to rescind the fraudulent compromise, and to obtain in the same action equitable relief, offering in his complaint to restore what he has received in case it shall be adjudged he is not entitled to retain it. Or a person so circumstanced may retain what he has received, and sue whoever is liable for the consequences of the deceit by which the compromise was brought about, and recover whatever damage resulted therefrom.”¹¹

¹⁰ *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255; *Evans v. Gale*, 17 N. H. 573.

¹¹ *McLean v. Assurance Soc.*, 100 Ind. 127; *Pangborn v. Insurance Co.*, 67 Mich. 683, 35 N. W. 814, and 17 Ins. Law J. 224; *Miller v. Powers*, 119

**§ 370. A Compromise Settlement will be Sustained in the
Absence of Fraud, Although Material Facts
have not been Disclosed.**

When no fraud is attempted, a compromise settlement will be sustained, although material facts have been withheld that were within the reach of the party injured, and could have been ascertained had proper inquiry been made. It is not necessary, therefore, to the validity of a compromise, that the legal rights of the parties should be discussed, or even known, when the means of knowledge is easily available. This was held in *Stache v. St. Paul F. & M. Ins. Co.*¹² The court said: "An agreement by an insurance company to pay a certain sum in compromise of a claim for a loss of insured property, made after a full opportunity to investigate the circumstances, and not induced by any fraud on the part of the insured at the time, is binding upon it, notwithstanding a breach of a condition of the policy not then known to it."

**§ 371. When an Adjustment with Promise of Payment
is not Conclusive.**

An adjustment, with promise to pay, is not conclusive when it is shown that important facts were withheld, which, if known to the party prejudiced, would have caused him to have acted differently. The insurer will not be bound, if it is ascertained, after the settlement, that the conditions of the policy have not been kept.¹³ To be binding upon the parties, the adjustment must rest upon that solid foundation of fair dealing and good faith which imports that there has been no concealment of important facts, and that the parties, in agreeing to the terms of settlement, have done so with a full understanding of all their rights.¹⁴

Ind. 79, 21 N. E. 455; *Home Ins. Co. v. McRichards*, 121 *Ind.* 121, 22 N. E. 875; *Norwich Union Fire Ins. Soc. v. Girtton*, 124 *Ind.* 217, 24 N. E. 984; *Brown v. Insurance Co.*, 117 *Mass.* 479; 5 *Benn. Fire Ins. Cas.* 735.

¹² 49 *Wis.* 89, 5 N. W. 36.

¹³ *American Ins. Co. v. Barnett*, 73 *Mo.* 364, 11 *Ins. Law J.* 104; *Colonus v. Insurance Co.*, 3 *Mo.* App. 56.

¹⁴ *Remington v. Insurance Co.*, 14 *R. I.* 245, 12 *Ins. Law J.* 892.

§ 372. When a Compromise will be Final.

Where there is a disagreement between the insured and the insurer as to the liability of the latter, and the dispute involves questions of either law or fact, it is competent for the contestants to end the controversy on a basis of compromise. When this is done, the courts will not inquire into the matter, unless fraud is alleged.¹⁵ When the settlement has taken this form, the loss been paid, and the claimant has signed compromise receipts, the insurer may not have the settlement rescinded on the ground that there have been breaches of the policy conditions unknown to him when agreeing to the compromise.¹⁶

In some instances the courts have gone so far in sustaining a compromise as to hold that it cannot be impeached even by showing fraud of such a character that, if pleaded in defense to a suit on the policy, would have defeated recovery.¹⁷ But the better rule, and the one most favorably regarded by the courts, will not enforce a contract, whether it be to create or to terminate an obligation, that has about it any distinctive element of fraud.¹⁸

§ 373. Conclusions.

The conclusiveness of a settlement will be recognized and upheld by the courts when there has been no fraud or duress, and the parties have acted with an understanding of their rights.

Fraud that will defeat a settlement may consist in doing, or, with dishonest purpose, omitting to do, any act that will deceive and mislead the adverse party to his injury. When the insured has

¹⁵ *Godchaux v. Insurance Co.*, 34 La. Ann. 235, 11 Ins. Law J. 698; *Phoenix Ins. Co. v. Van Allen*, 29 Ill. App. 149.

¹⁶ *Wagner v. Insurance Co.*, 143 Pa. St. 338, 22 Atl. 885, and 21 Ins. Law J. 119; *Smith v. Insurance Co.*, 62 N. Y. 85; *Illinois Mut. Fire Ins. Co. v. Archdeacon*, 82 Ill. 236.

¹⁷ *British America Assur. Co. v. Wilkinson*, 23 Grant (U. C.) 151. But it was held otherwise in *Queen Ins. Co. v. Devinney*, 25 Grant (U. C.) 394.

¹⁸ *Berry v. Insurance Co.*, 30 N. E. 254, 132 N. Y. 49, and 21 Ins. Law J. 455; *Potter v. Insurance Co.*, 63 Me. 440; *Brown v. Insurance Co.*, 117 Mass. 479.

caused the property to be burned with wicked intent, or has concealed, during the progress of the negotiations leading to the settlement, such breaches of the policy conditions as have destroyed its validity, there is such fraud as will justify a court in setting aside a settlement.

Duress is such wrongful compulsion as will exclude the presumption of free will. Consent is the basis of all obligation; and, if there has been such unlawful constraint as to forbid absolute freedom of choice, the constrained party will not be bound.

When one is influenced to his loss by the logic, superior dialectics, or wiser opinion of another, there is no duress. So, too, when the insured, having caused the destruction of the property, is led to take counsel of his guilty fears through the indignant and righteous denunciations of one who knows or suspects his crime, there is no legal duress.

A settlement will not be rescinded unless the consideration is returned. The rule is that one cannot repudiate a contract while continuing to enjoy its benefits.

A compromise settlement will be upheld, in the absence of fraud, although material facts have been withheld, and it is shown that both of the parties did not act with an intelligent understanding of all their rights.

CHAPTER XXIV.

BAILMENT AND CARRIER.

- § 374. Both the Bailor and Bailee may Insure.
- 375. When Bailee Insures to Protect Himself Only.
- 376. Bailee for Hire.
- 377. Grain in Elevators.
- 378. One cannot Insure Property in Which He has no Interest as Owner, Agent, Trustee, Bailee, etc.
- 379. Liability of Carriers.

§ 374. Both the Bailor and Bailee may Insure.

When personal property is the subject of bailment, both the bailor and bailee may insure, under a proper form of contract,—the bailor as owner, and bailee as trustee. It will frequently happen that the latter will have a personal interest to protect, on account of freights paid, warehouse charges, or advances made. In such cases, the policy should definitely express the particular interest the parties have intended to cover. Obscurity in this respect has been the cause of much contention. When the bailee holds a policy containing what is usually termed a “commission clause,” and including in the subject of insurance “goods, his own or held by him in trust,” the liability of the insurer is extended to all property at the place located, falling within the general description, of which he may be the owner or which he may hold in bailment.¹ To give legal effect to such contract of insurance, it is not necessary that the bailee should be liable to the owner, in event the property is destroyed by accidental fire, nor is it important that there should exist between the bailor and bailee any specific agreement that the latter should insure. As trustee of the property, in the absence of any instructions in the matter, he has implied authority to insure, and this he may do without even the knowl-

¹ California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, and 19 Ins. Law J. 385; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; De Forest v. Insurance Co., 1 Hall (N. Y.) 94; Baxter v. Insurance Co., 11 Biss. 306, 12 Fed. 481, and 11 Ins. Law J. 600.

edge of the owner, who may have procured other insurance in his own name. When this occurs, all policies held either by the owner or bailee will be subject to contribution in paying the loss.²

§ 375. When Bailee Insures to Protect Himself Only.

When a person holding goods in bailment insures to protect himself only, and the policy reads "on goods for which he may be liable," different, and very often difficult, questions arise. If there is no express contract between the bailor and bailee, definitely fixing the liability of the latter, such a liability must be determined by the character of their relations and the circumstances under which the loss occurred. If this bailment is gratuitous, only a slight degree of care will be required of the bailee. He must act in good faith, and with the intelligence which he is accustomed to show in managing his own affairs. The duty he has undertaken to perform being without compensation, and wholly for the benefit of the bailor, he will be charged with no special diligence or care. If he be a person of weak mind, or of careless or dissipated habits, and loss results on account of these mental and moral infirmities, the bailor will have no remedy.

In *Coggs v. Bernard* ³ Lord Holt said: "If the bailee is an idle, careless, drunken fellow, and goes home drunk, and leaves all his doors open, so that the bailor's goods are stolen with his own, it was the bailor's own folly to trust such an idle fellow. If he keeps the goods bailed to him as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them."

While the American authorities are not wholly in accord, they may be regarded as substantially sustaining the rule that when the bailment is solely for the benefit of the bailor, the bailee will not be liable for loss, unless it is occasioned through his gross negligence.⁴

² *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

³ 2 *Ld. Raym.* 909, 914.

⁴ *Spooner v. Mattoon*, 40 *Vt.* 300; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 *N. Y.* 278; *Griffith v. Zipperwick*, 28 *Ohio St.* 388; *Scott v. Bank*, 72 *Pa. St.* 471; *Schouler, Bailm.* (2d Ed.) p. 48; *Story, Bailm.* §§ 164, 166, 167, 171a, 172.

§ 376. Bailee for Hire.

Bailment, however, occurs more frequently under circumstances where the bailee is to receive compensation for the care and responsibility which his custody of the property contemplates. This may be either expressed or implied, or result as a necessary incident from the character of the bailment. The owners of grain elevators, wharfingers, and warehousemen usually stipulate a specific charge to be paid for the service they render in the keeping and storing of the property committed to their hands. Repairers, dyers, laundrymen, and others of that class, are bailees of the chattels placed in their hands for a different purpose, and, while there is no charge stipulated or even contemplated for "securely keeping," the bailment is not gratuitous. When the bailee is to receive compensation for his labor or skill in repairing, coloring, or renovating the goods bailed, this benefit is sufficient to create a bailment for hire, and the measure of the bailee's responsibilities will be enlarged. In cases of this kind, the bailee will be liable, and must respond, if the property is damaged by fire under circumstances where it appears that he has not exercised ordinary care. No exceptional diligence, however, is demanded. If the bailee acts in respect to the goods in his custody as a prudent person usually does in caring for his own property, he will not be charged with the loss.⁵

It is one or the other of these classes of bailees for hire that the insurer most frequently has to deal with under his contract, and from the authorities examined I find no room for doubt that, when the liability of the insurer is made to depend upon the liability of the insured for goods bailed, the former will not be charged, unless it appears that the latter has failed to exercise ordinary care. The rule in regard to carriers and innkeepers is exceptional, and in several states is the result of statutory provisions. Elsewhere these two classes of bailees are held to the exercise of the highest degree of vigilance. So severe, indeed, has the rule generally been made, that, when not relieved by contract exemptions, the bailee's liability will not be limited or qualified.

⁵ Story, Bailm. § 437; *Francis v. Railroad Co.*, 25 Iowa, 60; Schouler, Bailm. (2d Ed.) § 101.

§ 377. Grain in Elevators.

When grain has been deposited in elevators, with no definite understanding that it should be kept in separate bins, and subsequently delivered again to the depositor, the courts have been divided in opinion as to whether such deposit amounted to a bailment or a sale. The weight of authority, however, appears to be that when a redelivery is made impossible by reason of the grain having been placed in a common bin, and mingled with other grain of like grade, by consent of the person making the deposit, the transaction constitutes a sale.⁶

This question has come before the courts under circumstances so different that it is difficult to discover any general rule which can be applied in any large class of cases. This arises from the fact that the original owner of the grain, when placing it in elevator, has frequently done so either under written or verbal agreements, fixing, in some form more or less distinct, the relations between the depositor and the deposittee.

In *Schindler v. Westover*⁷ W. received a quantity of wheat, and there was an agreement to store until the following July, and that before that time the depositor might name a price for the wheat, or could demand that it be returned. The wheat was placed in a common bin with other grain of the same quality. The court, under this statement of facts, held that the deposit constituted a bailment, and not a sale; but it will be observed that there was a definite agreement that the wheat should be returned, if the depositor so elected.

⁶ *Chase v. Washburn*, 1 Ohio St. 244; *Johnston v. Browne*, 37 Iowa, 200; *Rahilly v. Wilson*, 3 Dill. 420, Fed. Cas. No. 11,532; *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101; *Lonergan v. Stewart*, 55 Ill. 44; *Richardson v. Olmstead*, 74 Ill. 213; *Nelson v. Brown*, 44 Iowa, 455; *Bailey v. Bensley*, 87 Ill. 556; *Carlisle v. Wallace*, 12 Ind. 252.

⁷ 99 Ind. 395. See, also, *Andrews v. Richmond*, 34 Hun (N. Y.) 20; *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090.

§ 378. One cannot Insure Property in Which He has no Interest as Owner, Agent, Trustee, Bailee, etc.

One person cannot insure the property of another, either for his own or for the benefit of whom it may concern, unless he holds some relations of interest or trust to such property. Trusteeship that gives the right to insure cannot exist independent of bailment or some other form of agency.

Mr. Wood, in discussing this question,⁸ says: "An agent, even, having no lien on goods for advances, commissions, or otherwise, or the possession, care, or custody of the same as carrier or bailee, or any liability to account for their loss by the perils insured against, has no insurable interest therein, although he is named as shipper and consignee in the bill of lading." He says, too, that "the same rule holds good as to consignees, carriers, factors, warehousemen, or bailees generally, unless they have, at the time of effecting the insurance, some interest therein, present or contingent, as a claim for freights, advances, profits, or some pecuniary interest, or are liable to the owner for the safe-keeping of the property. An insurance effected by them in their own name is totally inoperative and void, even though intended for the benefit of the real owner, unless ratified by him."⁹

§ 379. Liability of Carriers.

The carrier may so contract, for a consideration, as to limit his common-law liability to such losses only as have been caused by his own negligence. But the courts of this country with great uniformity, and on grounds of public policy, will not permit the carrier, by stipulation incorporated into his bill of lading, to relieve himself from loss which has been the result of his own fault or negligence. It has been held otherwise in New York in *Mynard v. Syracuse, B. & N. Y. R. Co.* and *Spinetti v. Atlas S. S. Co.*¹⁰ But, so far as my inquiry has extended, the reasoning of these cases has not been accepted by other courts in

⁸ 1 Wood, Ins. (2d Ed.) 664.

⁹ *Seagrave v. Insurance Co.*, L. R. 1 C. P. 305.

¹⁰ 71 N. Y. 180; 80 N. Y. 71.

this country. In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, this question was exhaustively discussed by the United States supreme court.¹¹ It was there distinctively held that, while the carrier could relieve himself, by proper form of stipulation inserted in his bill of lading, from loss caused by unavoidable accident, or from the fault of others, such stipulation would be void when made to express exemptions from liability where the loss was the result of the carrier's own negligence. The court said: "The ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods, and, as is everywhere held, an exception in the bill of lading of perils of the sea, or other specified perils, does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed."¹² The English decisions appear to be in support of the doctrine laid down in New York.

In *Missouri Pac. Ry. Co. v. Sherwood*¹³ suit was brought to recover the value of a lot of cotton destroyed by fire, while contained in compress at Greenville, Tex. The loss was without the fault of the railroad company, who had received the cotton for shipment at Greenville, Tex., and agreed to transport for a specified rate over its own and connecting lines, to London, Eng. The bill of lading given by the plaintiff in error to the shipper expressed that the railway company should not be liable for any loss or damage which the property might sustain while in transit, caused by fire or other accident. The Texas statute¹⁴ reads: "Railroad companies and other common carriers of goods, wares, and merchandise for hire, within this state, on land or in boats or vessels on the water, entirely within the body of this state, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions into the bill of lading, * * * or in any other manner whatever, and no special agreement made in contra-

¹¹ 129 U. S. 397, 9 Sup. Ct. 469.

¹² *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 6 How. 344; *Express Co. v. Kountze Bros.*, 8 Wall. 342; *Transportation Co. v. Downer*, 11 Wall. 129; *Grill v. Screw Co.*, L. R. 1 C. P. 600, L. R. 3 C. P. 476; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151.

¹³ 84 Tex. 125, 19 S. W. 455.

¹⁴ Rev. St. Tex. 1879, art. 278.

vention of the foregoing provisions of this article shall be valid." The Texas court held that, as the burning of the cotton was not caused by the negligence of the railroad company, it was not liable for the loss; that the provision of the Texas statute, quoted above, did not, by its own terms, apply, except when the contract for shipment was to be performed wholly in that state. The court said: "The statutes apply only to domestic shipments. If the statutes be intended to apply to foreign shipments, and to annul a contract of foreign shipment, exempting a carrier from liability for loss by fire not chargeable to its negligence, the statute is a regulation of interstate commerce, and as such regulation is void."

This declaration of the Texas court undoubtedly represents the rule of law correctly in regard to interstate commerce. When the policy is written to insure a carrier on its liability, it is unnecessary to state that the insurer will not be held for the loss of the property mentioned, unless it is shown that it is one for which the carrier is chargeable. This and analogous questions have received, during recent years, a good deal of attention from the courts. In discussing the rights and duties of a carrier, collateral and constitutional questions of great interest have been frequently involved. That interstate commerce is not subject to legislative control has been distinctly held many times by the United States supreme court. In the case of *Western Union Tel. Co. v. Pennsylvania*,¹⁵ it was held that the state of Pennsylvania could not recover taxes on telegraph messages to be delivered in another state; that, while it was competent for the state legislature to impose a tax on messages transmitted between points wholly within the jurisdiction of Pennsylvania, congress alone had the power of regulating commerce between different states. The same doctrine has been laid down in subsequent cases.¹⁶ The last authority here cited is known as the "Original Packet Case." The opinion was rendered by Chief Justice Fuller, who examined and critically reviewed nearly all of the decisions in this country in which the commerce clause of the constitution had been involved, and the

¹⁵ 128 U. S. 39, 9 Sup. Ct. 6.

¹⁶ *McCall v. California*, 136 U. S. 105, 10 Sup. Ct. 881; *State of Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862; *Home Ins. Co. v. New York State*, 134 U. S. 594, 10 Sup. Ct. 593; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681.

conclusion reached by the court was in full accord with its previous decisions cited above,—that the regulation of foreign or interstate commerce is exclusively within the power of congress, and that any restrictions imposed by state legislatures on commerce between different states would be unconstitutional and void.

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CHAPTER XXV.**REMEDIES.**

- § 380. What the Declaration must Aver.
- 381. Waiver and Estoppel must be Pleded.
- 382. Answer—What Defenses must be Specially Pleded.
- 383. When is a Suit Commenced?
- 384. An Alias Summons.
- 385. In Whose Name must Suit be Brought?
- 386. When Suit may be in Name of Mortgagee.
- 387. An Agreement between Mortgagor and Mortgagee as to Payment of Losses, without Notice to the Insurer, does not Bind the Latter.
- 388. When the Cause of Action on a Policy is Single, It cannot be Split into Several Suits.
- 389. When the Party Having the Beneficial Interest may Sue.
- 390. The Proper Person to Sue is the One from Whom the Consideration Moves.
- 391. Who shall Bring Suit?
- 392. In What Manner Expenses are to be Apportioned.
- 393. Written Assignment, on Payment of Loss, only Invests the Assignee with an Equitable Right to Cause of Action.
- 394. Action Separable when not Objected to.
- 395. Judgment Annulling Foreclosure and Sale not Conclusive as to the Validity of the Foreclosure Proceedings.
- 396. What is Legal Process?
- 397. The Garnishee must Act in Good Faith in Respect to all Parties.
- 398. When the Court Having Jurisdiction Refuses to Recognize Exemption Laws of the State where the Debtor Resides.
- 399. The Garnishee may Replace the Property Burned.
- 400. The Insurer as a Garnishee will be in Peril when the Court Wrongfully Takes Jurisdiction of the Case.
- 401. The Situs of a Debt is the Place where its Owner Resides.
- 402. When the Court will not Obtain Jurisdiction.
- 403. When Defendant is Nonresident, and no Personal Service had, the Court will not Have Jurisdiction.
- 404. Where is the Place of the Contract?
- 405. Parties to a Contract may Agree as to the Time when an Action to Enforce its Provisions shall be Barred.
- 406. When the Stipulation Limiting Time within Which Suit may be Brought is Waived.
- 407. When the Stipulation Limiting Time within Which Action can be Brought is not Waived.

- § 408. When Term of Limitation Begins to Run.
- 409. What Facts do or do not Constitute a Waiver of the Condition.
- 410. When Suit is Commenced within the Term, afterwards Dismissed, and Another Suit Brought after the Expiration of the Term, the Last Suit will be Barred.
- 411. Different Rule Followed in Ohio.
- 412. Separate Interests cannot be Joined in One Suit.
- 413. When the Insurer Keeps Itself Inaccessible to Service of Summons, the Insured will be Excused from Bringing Suit within the Time Stipulated.
- 414. What will not Excuse Failure to Bring Suit within Time Stipulated.
- 415. Conclusions.

§ 380. What the Declaration must Aver.

When suit is brought to recover under a policy of insurance, if the defendant be a foreign corporation, the declaration must set forth the state under whose laws it is organized, and in some states it is necessary to aver, and prove, that the defendant has complied with the statutes regulating foreign insurance corporations, and is authorized under these laws to do business. If, however, the company sued be a domestic corporation, created by an act of the legislature of the state where the suit is brought, then the courts will take judicial notice of its legal existence, and it will be unnecessary to plead the fact. The declaration should contain an averment of every fact that it will be necessary to prove, in order to maintain the action.¹ If, for instance, the policy provides that the insurer shall

¹ Pleadings must set forth, not in detail, but substantially, all the facts on which the action is based, or which are relied upon to constitute an avoidance of the policy. *Girard Fire Ins. Co. v. Boulden* (Ala.) 11 South. 773. Petition must aver a loss from fire under circumstances not within the excepted causes mentioned in the policy. *Ferrer v. Insurance Co.*, 47 Cal. 416.

Complaint must allege an insurable interest, and that premium has been paid or tendered. *Hardwick v. Insurance Co.*, 23 Or. 290, 31 Pac. 656.

Waiver cannot be shown, unless pleaded. *Gillett v. Insurance Co.*, 53 Kan. 108, 36 Pac. 52. It should appear in the petition in what manner the loss occurred. If burned, it will be sufficient to say so; if damaged from water in extinguishing fire on contiguous premises, the fact should be stated. *Thompson v. Insurance Co.*, 6 U. C. Q. B. 319.

Must aver ownership, and performance of all conditions precedent, unless waived, and then waiver must be averred. *Commercial Union Assur. Co.*

not be liable "unless the ownership be unconditional," to aver that the plaintiff has an insurable interest will not generally be sufficient, as an insurable interest may be less than the absolute ownership, and the latter must be shown in order to sustain the action; and this averment of ownership should be made both as to the time when the policy was issued and when the loss occurred. If the plaintiff did not have the interest which the policy expressed at the inception of the insurance, then no liability ever attached; and if he had ceased to have such interest when the loss occurred, then no recovery could be had, because of the change during the term of the insurance. The declaration should set forth the contract, either in *hæc verba* or in substance. If only the substantive parts are given, then either the original or copy of the policy should be attached as an exhibit, and so referred to as to make it a part of the declaration. But pleaders should be careful not to rely upon exhibits to supply the facts which should be set out in the declaration.

In *Johnson v. Home Ins. Co.*² it was held that an omission to state the contract in its material provisions would be fatal on demurrer; that such failure could not be cured by fishing among the exhibits to ascertain the facts which the declaration must contain. The court said: "It has been repeatedly held that the copy attached and filed with the pleadings forms no part of them, and that such exhibits will not be looked to, on demurrer to the pleadings, to aid its sufficiency."³ The petition must alone be looked to for a state-

v. Dunbar, 7 Tex. Civ. App. 418, 26 S. W. 628; *Allemania Fire Ins. Co. v. Fred* (Tex. Civ. App.) 32 S. W. 241.

It must be averred and proven that "proofs of loss" were furnished within the time required by the terms of the policy, or that the conditions requiring proofs had been waived. *State Ins. Co. v. Belford*, 2 Kan. App. 280, 42 Pac. 409. The petition should show that the loss occurred while the policy was in force. It should also set forth the amount insured on each class of property. *Phoenix Ins. Co. v. Perkey*, 92 Ill. 164.

² 3 Wyo. 140, 6 Pac. 729, and 16 Ins. Law J. 208.

³ The complaint must exhibit the policy, or a copy thereof. *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *Larimore v. Wells*, 29 Ohio St. 13; *Watkins v. Brunt*, 53 Ind. 208; *Bowling v. McFarland*, 38 Mo. 465; *Cairo & F. Co. v. Parks*, 32 Ark. 131; *Mayor, etc., of City of Los Angeles v. Signoret*, 50 Cal. 298.

ment of all material facts constituting a cause of action; and, if it is found deficient in this respect, it will be held bad on demurrer.

When an application is taken and signed by plaintiff, which, by its terms, or by proper reference in the policy, is made a part of the contract, it must be declared on, and a performance of all its conditions must be averred, or the declaration will be bad on demurrer. In *Bobbitt v. Liverpool & London & Globe Ins. Co.*⁴ the court held: "The application for a policy of insurance forms part of the contract when the policy refers to it as such, and the plaintiff must set it out in his complaint."⁵ In *Bidwell v. Connecticut Life Ins. Co.*⁶ an application was taken, which formed the basis of the insurance, but was not declared on as a part of the contract. The complaint being demurred to, Sawyer, Circuit Judge, said: "The defendant demurs upon the ground that the complaint is uncertain, it appearing upon its face that the entire contract is not set out. I think the point well taken. It is well settled that under the provision of the policy cited the proposals are not mere representations, made as an inducement to enter into a contract, but are warranties, and a part of the contract itself."⁷

The declaration should set out the occurrence of the loss, and that it was within the term of the policy. If it is a provision of the policy (as it frequently is) that the claim will not become due and payable until some specified time after proofs have been furnished the company (as 30 or 60 days), then the declaration must aver that suit was not commenced within the time mentioned for claim to mature.⁸

⁴ 66 N. C. 70.

⁵ *Ripley v. Insurance Co.*, 30 N. Y. 136.

⁶ 3 Sawy. 261, Fed. Cas. No. 1,393.

⁷ *Rogers v. Insurance Co.*, 72 Iowa, 448, 34 N. W. 202, and 17 Ins. Law J. 148; *Lycoming Fire Ins. Co. v. Storrs*, 97 Pa. St. 354; *American Underwriters' Ass'n v. George*, Id. 238.

It appears that this very general rule has been departed from in both Michigan and Indiana. In *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266, 34 N. E. 495, it was held that the application was not a necessary part of the petition. See, also, *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310, and *Throop v. Insurance Co.*, 19 Mich. 423, 439. In last case, Christiancy, J., dissented, urging the necessity of showing that plaintiff had performed the warranties expressed in the application.

⁸ *Doyle v. Insurance Co.*, 44 Cal. 264, 269; *Carberry v. Insurance Co.*, 51 Wis. 605, at page 609, 8 N. W. 406, at page 408; *Von Genechtin v. Insurance*

Unless the declaration shows that the debt was due at the time of bringing suit, it will be demurrable. The agreement on the part of the insurer to pay a loss is conditioned on the performance by the insured of certain things, such as the payment of the premium, giving notice and furnishing particular proofs of the loss within a specified time, arbitration and award, maintaining a watchman and certain fire-extinguishing apparatus, etc. These are conditions precedent, and performance must be averred, or facts stated, that will excuse it. Everything, in fact, which the insured has contracted to do must be averred as having been performed, or the declaration will be held bad on demurrer.

§ 381. Waiver and Estoppel must be Pledaded.

When waiver or estoppel is relied upon, it must be averred, as it cannot be shown on a plea of performance. It is an elementary proposition that the issues are created by the pleadings. That which is not pleaded is not in issue, and that which is not in issue cannot be proven.⁹

In *Dwelling-House Ins. Co. v. Johnson*¹⁰ the plaintiffs below in their petition set forth the contract, payment of premium, the destruction of the property by fire, and the performance of all the conditions of the policy incumbent upon them. The defendant answered, alleging a breach of the conditions of the policy in regard to

Co, 75 Iowa, 544, 39 N. W. 881; *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. 408.

⁹ *Lanitz v. King*, 93 Mo. 513, 6 S. W. 263; *Bruce v. Insurance Co.*, 24 Or. 486, 34 Pac. 16; *Nichols v. Larkin*, 79 Mo. 264; *Welsh v. Insurance Co.*, 71 Iowa, 337, 32 N. W. 369; *Weidert v. Insurance Co.*, 19 Or. 261, 24 Pac. 242; *Purdue v. Noffsinger*, 15 Ind. 386; *Newby v. Rogers*, 40 Ind. 9; 1 Works, Prac. § 395.

Waiver cannot be shown, unless pleaded. *Gillett v. Insurance Co.*, 53 Kan. 108, 36 Pac. 52.

Estoppel must be pleaded. *Bruce v. Insurance Co.*, 24 Or. 486, 34 Pac. 16; *Hand v. Insurance Co.*, 57 Minn. 519, 59 N. W. 538; *Boon v. Insurance Co.*, 37 Minn. 426, 34 N. W. 902; *Weidert v. Insurance Co.*, 19 Or. 261, 24 Pac. 242, and 19 Ins. Law J. 750; *Edgerly v. Insurance Co.*, 43 Iowa, 587, 5 Ins. Law J. 846; *Eiseman v. Insurance Co.*, 74 Iowa, 11, 36 N. W. 780, and 17 Ins. Law J. 843.

¹⁰ 47 Kan. 1, 27 Pac. 100.

incumbrances. On these pleadings the trial court admitted proof tending to show a waiver of the policy condition in regard to incumbrances. This was held to be error. The court said: "It is insisted that this evidence and these instructions are not within the issues or warranted by the pleadings in the case, and we are forced to that conclusion. The conduct and acts of the agent and the adjuster, relied on as a waiver, form an important condition of the contract, and, to estop the company from claiming a forfeiture, should have been specially pleaded. The same may be said respecting the compromise and settlement which has been referred to. This was new matter, which should have been set forth in the reply with frankness and certainty, so that the company might have been prepared to meet the issues with its proof. As the issues were framed, the company had no notice that the assured would make any claim of waiver or estoppel. They set up in their petition the contract, the loss, and the refusal of payment. The company answered that certain conditions of the contract had been broken, and hence no recovery could be had. The assured replied by a mere denial, which was nothing more than to say that no breach had occurred. * * * It is uniformly held that a waiver or estoppel must be specially pleaded, before evidence to establish the same can be admitted. Under our Code, the facts relied upon as a ground of action or defense must be clearly and concisely stated, and a definite issue presented, so that the opposite party may not be taken by surprise upon the trial, but may be fairly notified of what he is required to meet. The new matter introduced in this case was not put in issue by the pleadings, and the company may, as they allege, have been taken by surprise, and wholly unprepared with their proof to contest the new issue. Neither the evidence introduced nor the instructions based thereon are warranted under the pleadings as they exist, and, before they can be properly received, the reply must be amended."¹¹

¹¹ American Cent. Ins. Co. v. McLanathan, 11 Kan. 533; St. Louis, Ft. S. & W. R. Co. v. Grove, 39 Kan. 731, 18 Pac. 958; Atchison, T. & S. F. R. Co. v. Irwin, 35 Kan. 286, 10 Pac. 820; Texas Banking & Ins. Co. v. Hutchins, 53 Tex. 61; Hayes v. Association, 76 Va. 225; Lumbert v. Palmer, 29 Iowa, 104; Northrup v. Insurance Co., 47 Mo. 435; Warder v. Baldwin, 51 Wis. 450, 8 N. W. 257; City of Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937; Phillips v. Van Schaick, 37 Iowa, 229; Dale v. Turner, 34 Mich. 405; Pom. Rem. & Rem. Rights, §§ 556, 590, 661.

In *Phenix Ins. Co. v. Bachelder*¹² the premium note had not been paid, although past due when loss occurred. The plaintiff pleaded performance, but in the trial of the case offered evidence to show waiver. The opinion of the court was by Norval, J. He said: "There was some evidence offered for the purpose of showing that the company waived the terms of the policy in regard to the payment of the premium note; but such evidence, under the pleadings as framed, could not avail defendant in error. The issue was squarely presented by the pleadings whether or not the note was paid. We doubt not that the stipulation in the policy can be waived, but when such waiver is relied upon it must be pleaded."¹³

See, also, *Eiseman v. Hawkeye Ins. Co.*¹⁴ The supreme court of Iowa there held that waiver could not be shown unless pleaded.

Where the policy provides that proofs of loss must be made within any specified time,—as 30 or 60 days,—the fact that "proofs" were so furnished must be pleaded and proved. This was held in *German Ins. Co. v. Fairbank*.¹⁵ Norval, J., there said: "The policy requires that proofs be made within thirty days after the loss, and it was incumbent upon the plaintiff to establish on the trial that this stipulation was complied with, or that the company had waived the same. If the plaintiff relies upon a waiver of the provision, it should be pleaded. For the failure to prove on the trial that proofs of loss were made, the judgment is reversed."

When the policy provides that it shall be void if the property insured shall thereafter become unoccupied, incumbered, or if it shall be insured in other companies without notice and consent indorsed in writing, and the fact of other insurance, incumbrance, or vacancy is admitted in the declaration, an averment that notice was duly given of such vacancy, incumbrance, or additional insurance will not be sufficient, and a demurrer will be sustained, as notice does not of itself fulfill the entire obligation. Indorsement of consent on the policy by some agent or officer having authority to waive conditions

¹² 32 Neb. 490, 49 N. W. 217.

¹³ *Zinck v. Insurance Co.*, 60 Iowa, 266, 14 N. W. 792; *Welsh v. Insurance Co.*, 71 Iowa, 337, 32 N. W. 369; *Mehurin v. Stone*, 37 Ohio St. 58; *Palmer v. Sawyer*, 114 Mass. 13; *Nichols v. Larkin*, 79 Mo. 264.

¹⁴ 74 Iowa, 11, 36 N. W. 780, and 17 Ins. Law J. 843.

¹⁵ *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711.

of the policy is imperative to save a forfeiture, and the fact that such indorsement was made should be pleaded when the precedent fact is admitted.¹⁶ "A waiver by one party to an agreement of the performance of a stipulation in his favor is not a performance of that stipulation by the other. It is an excuse for nonperformance, and as such should be pleaded."¹⁷

The issues are presented by the pleadings; and when the declaration avers performance, and the answer denies, proof of waiver or estoppel would be irrelevant, and, if objected to,¹⁸ its admission would be error, as the issue raised by the pleadings is the only subject-matter upon which the jury has to pass. No evidence can be admitted for the purpose of either proving or disproving any fact not stated in the declaration, when the answer is general denial. No recent cases have been brought to my attention where a different practice has been held in code states. The rule, it appears, is founded in the necessity of parties being apprised, when entering upon the trial of a case, of the exact questions that will be contested; otherwise frequent surprises would result as the trial proceeded. Witnesses who have been brought into court at much cost and trouble, to support the answer that performance has not been had, would not be needed, while others, who have not been subpoenaed, would be required to disprove a waiver which has not been pleaded. The issues are vitally different, and evidence cannot be received in support of one, when the other one is averred, without such flagrant injustice to parties as no court ought to permit. A different rule, however, has been held when the practice is under the common law. In the case of *German Fire Ins. Co. v. Grunert*¹⁹ the court said: "Plaintiff need not file a replication to defendant's answer, which alleged that he failed to furnish proofs of loss in time. The doctrine

¹⁶ *Hankins v. Insurance Co.*, 70 Wis. 1. 35 N. W. 34; *Zimmerman v. Insurance Co.*, 77 Iowa, 685, 42 N. W. 462; *Wilkins v. Insurance Co.*, 43 Minn. 177, 45 N. W. 1.

¹⁷ *Mehurin v. Stone*, 37 Ohio St. 58; *Palmer v. Sawyer*, 114 Mass. 13.

¹⁸ Plaintiff pleaded performance. This was not shown, but evidence was admitted without objection to show waiver. Held, as there was no objection to the admission of such testimony, the waiver was established; that the variance between the pleadings and the evidence was waived. *Hand v. Insurance Co.*, 57 Minn. 519, 59 N. W. 538.

¹⁹ 112 Ill. 68.

of waiver in this regard is substantially that of an estoppel in pais, which at common law need not be pleaded."

§ 382. Answer—What Defenses must be Specially Pleaded.

When the defense arises from a failure to perform the conditions of a policy, such as payment of the premium, notice or proofs of loss, arbitration, etc., it has been held in some of the states to be sufficient for the answer to express a general denial. When this is done, the defendant is saved from making the disclosure (until called upon during the trial to produce his evidence) under which of the several conditions of the policy his defense rests. This will, no doubt, sometimes occasion the plaintiff perplexity and confusion, and possibly cause him to neglect or wholly overlook the real point in the controversy, while directing all his efforts to fortifying what he may suppose to be the most important and vulnerable point in his case, but which is shown to have no special significance, on account of the manner in which the defense is subsequently developed. But it is generally required, and always safer, to plead specifically each matter relied on to defeat the action.²⁰

All matters that are prohibited in the contract, such as the storing of dangerous articles, incumbering the property, or obtaining additional insurance, are matters of defense, and must be set out in the answer specifically. If fraud is relied on to defeat recovery, it cannot be made available unless pleaded,²¹ although, under a plea of nil

²⁰ Pleadings must set forth all the facts on which the action is based, or which constitute an avoidance of the policy. *Girard Fire Ins. Co. v. Boulden* (Ala.) 11 South. 773; *Greiss v. Insurance Co.*, 98 Cal. 241, 33 Pac. 195.

In *Benjamin v. Association*, 44 La. Ann. 1017, 11 South. 628, the plaintiff pleaded performance of all the conditions. The answer pleaded the general issue. The defense relied on was breach of warranty. Held that this defense could not be shown, unless specially pleaded; that all matters in avoidance of the contract must be set out and specifically pleaded. *Haskins v. Insurance Co.*, 5 Gray (Mass.) 432; *Mulry v. Insurance Co.*, Id. 541; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *Cassacia v. Insurance Co.*, 28 Cal. 628; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656.

²¹ If fraud is relied upon as a defense, it must be specifically pleaded. Such facts must be represented as will sustain the plea, if shown to be true.

debet, it was held in a Tennessee case (*Phoenix Ins. Co. v. Munday*)²² that evidence of fraud was admissible.

When suit is brought to set aside a settlement where the policy has been surrendered and receipts given in full acquittance, the declaration should contain an averment that the settlement was procured by fraud or duress, that the plaintiff has given notice to the company of his repudiation of such settlement, and that he has returned or offered to return to it the money he has been paid in consideration for the release and acquittance given. "The general rule is that the defendant must spread the matter of his defense upon the record, that the plaintiff may be informed of the questions which he intends to litigate."²³ Still, when it is averred in the declaration that there has been a performance of all the conditions, all matters of defense that arise out of a nonperformance can be put in issue by general denial.²⁴ The careful pleader, when the declaration has been unskillfully framed as to a clear presentation of the case, may, however, often deem it the better part of wisdom to lay bare his defense by answering specifically than to assume the risk of having his evidence ruled out under a plea of general denial. The courts are not all in accord as to what questions, arising under the insurance contract, can be put in issue only by being specifically set out in the answer.

§ 383. When is a Suit Commenced?

The bringing of a suit is a proceeding generally defined and regulated by statute. It has been said by one who is accustomed to speak with authority in respect to rules of law that "in all purely statutory proceedings, where a substantial compliance with the course pre-

"The general rule is," says the court, "that a defense should be so pleaded that, being admitted as pleaded, judgment must go for defendant," and this rule is especially rigid in pleading fraud or forfeitures. *Greiss v. Insurance Co.*, *supra*; *Ferriss v. Insurance Co.*, 1 Hill (N. Y.) 71; *Sterling v. Insurance Co.*, 32 Pa. St. 75; *State Ins. Co. v. Hughes*, 10 Lea (Tenn.) 461; *Flynn v. Insurance Co.*, 17 La. Ann. 135, at page 136; *Mayor, etc., of New York v. Brooklyn Fire Ins. Co.*, *43 N. Y. 465.

²² 5 Cold. (Tenn.) 547.

²³ *Weed v. Insurance Co.*, 7 Lans. (N. Y.) 452.

²⁴ While this is a logical conclusion, and theoretically correct, the practice is different in most of the states.

scribed is essential to confer jurisdiction, an omission of compliance in any essential respect makes the determination finally reached a nullity." It will be perhaps superfluous to add that the conclusion reached is a nullity for the reason that the court never has authority to entertain the case. A valid, judicial act can only arise upon a precedent right to consider the matter, and when the statute provides the manner in which this right shall be acquired there must be substantial conformity with its terms in order to confer jurisdiction.²⁵

In Illinois, and in several other states, the filing of a *præcipe* is the beginning of a suit, but generally an action has not been commenced until the summons is served. When the action begins with the filing of a *præcipe*, and a summons issues, but no service has been obtained, and the process is returned, an alias may be issued. The suit then will not fail, because there was no service of the original summons; but when the suit fails for want of jurisdiction, the action is at an end, or, perhaps, more properly speaking, was never commenced.²⁶

In *Miller v. Brickerhoff* ²⁷ the process on which the proceeding was instituted could issue only under the statute on an affidavit setting out certain facts. Bronson, C. J., said: "The affidavit was bad within all the cases, and the proceedings founded upon it were void."

So, too, in *Stone v. Miller*,²⁸ it was held: "When the jurisdiction of the court or officer is made to depend on the return of a process in a given form or approved by a particular fact, and the return is not substantially in the form prescribed, or the fact is not approved, the court or officer does not acquire jurisdiction, and the proceedings are practically void."

And in *Brown v. Mayor, etc., of City of New York* ²⁹ the court said: "A failure to comply with the statutory requirements in any essential respect makes any ultimate determination of any proceedings therein a nullity."

²⁵ *Farmer v. Association*, 50 Fed. 829.

²⁶ *Bloom v. Burdick*, 1 Hill (N. Y.) 131; *Stone v. Miller*, 62 Barb. (N. Y.) 431; *Miller v. Brinkerhoff*, 4 Denio (N. Y.) 118; *Staples v. Fairchild*, 3 N. Y. 41; *People v. Soper*, 7 N. Y. 428.

²⁷ 4 Denio (N. Y.) 118.

²⁸ 62 Barb. (N. Y.) 431.

²⁹ 3 Hun (N. Y.) 685.

§ 384. An Alias Summons.

When the suit fails because the court did not obtain jurisdiction, or is dismissed for any reason, there is no longer a suit, and subsequent proceedings must be founded upon a new and original process. An alias summons may continue an existing suit, as before explained, but can never have a greater legal effect.

Bouvier says: "An alias writ is only issued where one of the same kind has been issued before in the same cause."³⁰

There is found an interesting discussion of this question in the case of *Everett v. Niagara Ins. Co.*³¹ We quote from the syllabus: "Action was commenced by *præcipe*, filed December 27, 1887. A year afterwards the summons was set aside, and defendant, appearing *de bene esse*, had judgment *non pros.* entered on January 25, 1889. A *præcipe* for alias summons was filed, and afterwards the judgment *non pros.* was stricken off by the court on the ground that defendant, having appeared *de bene esse* only, had no authority to enter it. Held that, though the judgment *non pros.* was on the record when the alias summons issued, yet, being afterwards stricken off as unauthorized, the original was left standing, and the alias summons issued thereon was good."

§ 385. In Whose Name must Suit be Brought?

Under the common law, an action on a policy of insurance will not be sustained unless brought in the name of the assured. This was distinctly held by the supreme court of Illinois in the case of *United States Life Ins. Co. v. Ludwig*.³² The insured, Otto C. Ludwig, some years before his death, made a formal assignment to his three children of the policies in suit, but continued up to the time of his decease to pay the premium for the benefit of the assignees, in whose names suit on the policies was brought. The court said: "A single question arising on this record is presented for our consideration by the agreement of counsel: Are the plaintiffs entitled to

³⁰ See, also, *Reid v. Lord*, 4 Johns. (N. Y.) 118; *Meredith v. Hinsdale*, 2 Caines (N. Y.) 362; *Petrie v. Woodworth*, 3 Caines (N. Y.) 219.

³¹ 142 Pa. St. 322, 21 Atl. 817.

³² 103 Ill. 305.

prosecute an action at law in their own name on these policies? Policies of insurance are but choses in action, and governed by the same principles applicable to choses in action in general. They are assignable in equity only, and in this state, and in others, where the strict rules of the common law prevail, courts of law will not recognize the assignment so as to allow the assignee to sue on the policy in his own name.³³

In states having a code practice, the courts have not always been in accord as to who may sue, the person insured, or one holding by appointment a beneficial interest. Generally it has been held that when a policy has been assigned, and the assignee has acquired a sole interest, an action can be maintained in his name. So, too, when the policy is issued in the name of a mortgagor, but paid for by the mortgagee, and procured exclusively for his benefit, as a general proposition it may be said that he may sue from whom the consideration moves. Hence it appears that when the insurance is taken out in the name of the mortgagor, at his cost, and for his protection, although it contains a directory clause that the loss shall be payable to a mortgagee, as his interest may appear, the action must be brought in the name of the mortgagor.³⁴ The clause making the loss payable to a mortgagee is held to be only a direction in advance as to payment of the loss, and does not divest the mortgagor of his interest in the policy, and hence the suit to recover thereon must be brought in his name. By this declaration we must not be understood as denying that it is not always proper to bring suit in the name of both the mortgagee and the mortgagor.³⁵ In Wisconsin it

³³ *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221; *Peoria Marine & Fire Ins. Co. v. Hervey*, 34 Ill. 62; *Massachusetts Mut. Life Ins. Co. v. Robinson*, 98 Ill. 324; *Bliss, Ins.* § 325; *May, Ins.* § 377; *Jessel v. Insurance Co.*, 3 Hill (N. Y.) 88; *Am. Lead. Cas.* (5th Ed.) 886, 887.

³⁴ *Williamson v. Insurance Co.*, 86 Wis. 393, 57 N. W. 46; *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191.

³⁵ When loss is made payable to mortgagee absolutely, he may sue for whole sum. Whether the debt be more or less, his receipt will be full acquittance. When loss is made payable to mortgagee as his interest may appear, suit should be brought by both the mortgagor and mortgagee. *Ermontout v. Insurance Co.*, 60 Minn. 418, 62 N. W. 543; *Carberry v. Insurance Co.*, 86 Wis. 323, 56 N. W. 920; *Hathaway v. Insurance Co.*, 134 N. Y. 409, 32 N. E. 40; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. 383.

is held that the action will be sustained if brought in the name of the mortgagee alone. The rule appears to be, however, that suit should be in the name of the assured, except where the property has been sold, and the policy assigned, by the consent of the company, or where the insurance is taken with the understanding of the parties that the assignee, payee, or mortgagee is the real party insured; in which case, of course, he will be the proper person to sue. If such rule is discernible, it must be admitted to be one of many and varied exceptions.

§ 386. When Suit may be in Name of Mortgagee.

To give the payee or mortgagee an independent right of action, there must exist between him and the insurer contractual relations, to the extent that the money to be paid in the settlement of a loss will be primarily due to him, and not to the nominally insured. There must be no cause for accounting involved, no adjustment of interests, of which the money due from the insurer will form a part or become the subject of an action in which the latter can be made defendant. Independent contract relations will exist between the insurer and the assignee after a loss, or before the loss if the assignment is absolute, and with the consent of the insurer. So, too, if the insurance is paid for by the mortgagee, and procured for his sole benefit, or if, as it frequently occurs, the insurance is paid for by the mortgagor, and the policy contains a stipulation that the loss shall be payable to the mortgagee, and that as to the latter the policy shall not become invalidated on account of any act or neglect of the insured or mortgagor; and that when a forfeiture shall exist as to the insured or mortgagor, a payment of the loss shall entitle the insurer to subrogation.³⁶

The principles of law applicable in cases of this kind were pointed out, considered, and distinguished with discriminating care in the case of *Martin v. Franklin Fire Ins. Co.*³⁷ The policy in that case

³⁶ *Mitchell v. Assurance Co.*, 15 Ont. App. 262; *Rex v. Insurance Cos.*, 2 Phila. 357; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Nichols v. Baxter*, 5 R. I. 491; *Ripley v. Insurance Co.*, 29 Barb. (N. Y.) 552; *Fox v. Insurance Co.*, 52 Me. 333; *Brush v. Insurance Co.*, 1 Oldr. 459.

³⁷ 38 N. J. Law, 140.

had written on its face the following words: "Loss, if any, payable to Garret G. Vreeland as mortgagee," and the demurrer was urged on the ground that the action should have been brought in the name of Vreeland instead of Martin, in whose name the policy was issued. In the opinion of the court we find the proper distinction made between life and fire insurance, as to the rights of third persons who may have beneficial interests. The court states as a general rule that "on a life policy where the money to become due under it is payable to certain persons named as beneficiaries, the policy and money payable thereon belong, the moment it is issued, to the person designated, and they are the proper parties to receipt for the money and sue on the policy. The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor if it be expressed to be for the benefit of some one else."—Referring to *Hillyard v. Mutual Benefit Life Ins. Co.*³⁸ This rule, the court explains, is based chiefly on the recognized fact that a life policy is essentially a wager; that the elements of interest which are indispensable in fire insurance do not necessarily exist; that life insurance is a mere contract to pay, in consideration of the premium, on the death of the person named in the policy, to any one who may be designated as having the beneficial interest. It says: "If by the terms of the policy the money is payable to a third person, such person has the sole and exclusive interest in the insurance." Certain important distinctions are then pointed out between life and fire insurance. "The latter," it says, "is a contract of indemnity which requires an insurable interest in the property to give it validity. The owner who obtains the insurance, pays the premium, and takes a policy in his own name is the party insured, although, in case of a loss, payment is to be made to a third person.³⁹ If the person to whom the loss is made payable be a mortgagee, the contract, nevertheless, is with the owner for the insurance of his property, and not with the mortgagee for the insurance of his interest.⁴⁰ * * * The direction to pay the sum in which the insurance was effected to the mortgagee, in case of loss, is collateral to the principal contract, and is

³⁸ 35 N. J. Law, 415; Bliss, Ins. § 317.

³⁹ *Sanford v. Insurance Co.*, 12 Cush. (Mass.) 541.

⁴⁰ *Grosvenor v. Insurance Co.*, 17 N. Y. 391; *Bidwell v. Insurance Co.*, 19 N. Y. 179.

not an assignment of the policy. The legal effect of such a clause in favor of a third person in a policy in terms between the insurer and the owner is that of a direction in advance as to the mode of payment, which, when made, is performance of the contract in the manner assented to by the insured, and discharges the obligation *pro tanto*.”⁴¹

In *Brunswick Sav. Inst. v. Commercial Union Ins. Co.*⁴² the insurance was made to Sophia B. Merrill, and the policy contained a clause as follows: “Payable in case of loss to Brunswick Saving Institution to the amount of mortgage held by them.” The court said: “Under this policy, by the well-settled rule of law, Sophia B. Merrill is the assured. She was the owner, had an insurable interest in the property, and paid the premium. The insurance was upon her property, and not upon the interest of the plaintiffs as mortgagees.”⁴³ The court then adds: “The clause in the policy, ‘Payable in case of loss to the Brunswick Saving Institution to the amount of mortgage held by them,’ is not an insurance of the plaintiffs’ interest in the property, nor an assignment of the policy to the plaintiffs. It is merely a contingent order or stipulation, assented to by the defendants, for the payment of a loss of the assured, if any, to the plaintiffs, who have the same right to recover that the assured would if no such clause had been inserted in the policy. Any violation of the conditions and stipulations of the policy which would defeat the right of the assured to recover upon it will defeat the right of the plaintiffs.”⁴⁴

Here the defense was made on the breach of the conditions of the policy in regard to change of title, and no question was raised as to whether the action was brought by the proper party. The court, however, clearly states that Mrs. Merrill was the person insured, and

⁴¹ *Fogg v. Insurance Co.*, 10 Cush. (Mass.) 346; *Hale v. Insurance Co.*, 6 Gray (Mass.) 172; *Loring v. Insurance Co.*, 8 Gray (Mass.) 29; *Turner v. Insurance Co.*, 109 Mass. 573. See, also, *Farrow v. Insurance Co.*, 18 Pick. (Mass.) 53; *Davis v. Boardman*, 12 Mass. 80.

⁴² 68 Me. 313, 8 Ins. Law J. 120.

⁴³ *Sanford v. Insurance Co.*, 12 Cush. (Mass.) 541; *Jackson v. Insurance Co.*, 5 Gray (Mass.) 52; *Turner v. Insurance Co.*, 109 Mass. 568; *Franklin Savings Inst. v. Central Mut. Fire Ins. Co.*, 119 Mass. 240.

⁴⁴ *Bates v. Insurance Co.*, 10 Wall. 33; *Grosvenor v. Insurance Co.*, 17 N. Y. 391; *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. St. 438; *Foote v. Insurance Co.*, 119 Mass. 259; *Smith v. Insurance Co.*, 120 Mass. 90.

that the legal effect of the "loss payable clause" was no more than a contingent order to pay to the Brunswick Savings Institution any money that might be due the insured, not exceeding its mortgage claim. That suit might be brought by the mortgagee, as in this instance, if not objected to by the insurer, no doubt is suggested, but under the statement of the law given by the court in respect to the party insured and the real parties to the contract it is quite evident that, had the defendant demurred on the ground that the action had not been brought by the proper party, he would have been sustained.

§ 387. An Agreement between Mortgagor and Mortgagee as to Payment of Losses, without Notice to the Insurer, does not Bind the Latter.

In *Stearns v. Quincy Mut. Fire Ins. Co.*⁴⁵ one Andrews held a mortgage on the property insured, which contained a stipulation that Stearns, the mortgagor, should keep the property insured for a specified amount, in such companies as Andrews should approve. The insurer had no knowledge of this agreement. After the fire, Andrews notified the company that he claimed the right to be paid the amount for which the company was liable to Stearns, but, disregarding this notice, the loss was paid to Stearns. This payment was claimed by Andrews to have been wrongfully made, and the question presented for the discussion of the court was whether Andrews, suing in the name of the plaintiff at law, can also recover for his own use and benefit. The court said: "The plaintiff relies on the rule that where a promise is made by one person to procure an insurance upon property in which another has some interest for the benefit of the latter, and then the promisor, with the intention of performing his promise, obtains a policy of insurance in his own name, the party intended to be benefited will have an equitable lien on the policy and its proceeds, which he may enforce against the insurer or the promisor, or may maintain against the creditors of the latter. * * * In all cases found which support the claim of the mortgagee to insurance obtained by the mortgagor in his own name, the facts were such as to justify the conclusion, by estoppel or otherwise, that such insurance was obtained by the latter as the

⁴⁵ 124 Mass. 61, 7 Ins. Law J. 506.

agent of, or with intent to perform the obligation he had assumed to, the former. * * * A mere promise to pay a debt out of a particular fund is not an assignment, even in equity. There must be an actual or constructive appropriation of the subject-matter in favor of the party benefited.”⁴⁶

§ 388. When the Cause of Action on a Policy is Single, it cannot be Split into Several Suits.

The court, continuing the discussion, affirms that if Andrews even had an equitable claim to the insurance, or a part of it, “he cannot enforce it in a suit at law on the policy in the name of Stearns, the mortgagor, because the latter must have an equal right to recover his share in such an action, and the company would be compelled to pay one loss by installments to different persons, and be subject to two suits for the same cause of action in favor of the same plaintiff.”⁴⁷

In the case of *Hartford Fire Ins. Co. v. Davenport*⁴⁸ the policy was issued to one Headly, and indorsed on its face, “Payable, in event of loss to the property on said farm premises, to the executors of the estate of Davenport as mortgagees, as their interests may appear.” The insurance covered on several different buildings and personal property, aggregating \$2,500. The mortgage was on the real estate only, and amounted to \$2,000. Suit was brought by the mortgagee. The court held that it was not commenced by the proper parties. We quote from the decision as follows: “We are of the opinion that plaintiff below showed no right to sue upon the contract. The parties to this policy were Headly and the company.”⁴⁹ The policy was to insure his interest, not that of the mortgagees; and any money paid to them would inure to his benefit. They hold no assignment of the policy, and sue as original parties. No one can dispute the right of parties to a contract to make money payable to

⁴⁶ *Christmas v. Russell*, 14 Wall. 70.

⁴⁷ *Palmer v. Merrill*, 6 Cush. (Mass.) 289; *Gibson v. Cooke*, 20 Pick. (Mass.) 15.

⁴⁸ 37 Mich. 613, 7 Ins. Law J. 228.

⁴⁹ *Van Buren v. Insurance Co.*, 28 Mich. 397; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Manuf'g Co.*, 31 Mich. 345.

a third person, if they see fit. It is not important in this case to inquire whether, if the policy before us gave the mortgagees an exclusive right to the whole insurance money, they might sue for it. In the present case the policy does not purport to do any such thing. It covers property not included in the mortgage, and only provides for payment to them of the insurance money due upon the property with which they are concerned. Upon the trial it appeared that other property was burned, and the court excluded them from recovering beyond their own share, and Headly lost his share of the money entirely. Now, there can be no splitting up of causes of action on a single policy. The party insured retained, by the terms of the policy, his interest beyond the control of the mortgagees. Their interests were several, and not joint. Under such circumstances it cannot be held that the mortgagees have any control of the policy which would authorize them to sue upon it. No doubt the company would be protected in paying them their share as equitable appointees, but they cannot be treated as trustees for Headly's benefit. He, and not they, must be held the legal owner of the policy, which stands in his name, and was made for his benefit."

The United States circuit court for Colorado, in ruling on demurrer to complaint in the case of *Thatch v. Metropole Ins. Co.*,⁵⁰ referred to the case last considered (*Hartford Fire Ins. Co. v. Davenport*), and fully approved of the conclusions reached by the Michigan court. The insurance was in the name and on the property of Emma Oray, and the policy indorsed, "Loss payable to Thatch, as his interest might appear." Judge Hallett, in his opinion, intimated that if the policy had provided that the whole sum of the insurance or loss should be paid to the plaintiff, a right of action would then arise in him, and that suit in his name could be maintained. He said: "If it appeared in the complaint that insurance was taken out by this woman, and that the stipulation of the policy is that the loss, if any, should be paid to the plaintiff,—all of it, the entire sum,—a question would be presented as to the right of the plaintiff to recover on such an instrument, which is not very well settled by the authorities. Perhaps the weight of authorities is that in such case the plaintiff would be entitled to maintain the action; that is

⁵⁰ 11 Fed. 29, 11 Ins. Law J. 199.

to say, if two persons contract for the benefit of a third, the third party, although a stranger to the consideration, may maintain a suit upon that contract. But that is not the case as presented here. It is entirely consistent with the allegations of the complaint that the sum due the plaintiff was much less than the amount for which the policy of insurance was issued, and, at all events, whatever the facts may be as to that, the policy of insurance provided for payment to the plaintiff as his interest might appear. At the time of insurance he was a creditor of the party taking out the policy, and his indebtedness might be entirely extinguished or greatly reduced before the policy should mature. That was, perhaps, the reason for putting in the policy this clause, in this phraseology, 'Payment should be made to him as his interest might appear,'—that is, more or less, the sum due him, whatever it might be,—and upon that no right of action can arise to the plaintiff, because it is not a stipulation to pay the plaintiff the loss, all of it, whatever it may be, upon maturity of the policy; and that must be the agreement to enable the plaintiff under a stipulation of this kind to recover in the action."

§ 389. When the Party Having the Beneficial Interest may Sue.

We have heretofore referred to the fact that the supreme court of Wisconsin has taken a position somewhat different from the courts of other states in respect to the right of a mortgagee to maintain an action under certain circumstances. This question was before that court in the case of *Hammel v. Queen Ins. Co.*,⁵¹ and the decision rendered was by a divided court, Judge Orton writing a dissenting opinion. We quote from the opinion of a majority of the court: "The plaintiff was mortgagee of the premises insured, and loss, if any, was made payable to him as his interest might appear. His mortgage debt is averred to be greater than the sum insured. Thus his interest appears to be the whole interest of the policy. In these circumstances it is difficult to perceive why the mortgagor is a necessary party. It has been held in this court that where the legal title of the policy is in the creditor he may maintain an action on

⁵¹ 50 Wis. 240, 6 N. W. 805, and 9 Ins. Law J. 905.

the policy in his own name.⁵² Elsewhere the great current of authority is to the same effect. Both may, undoubtedly, join as plaintiffs, as has been often held in this court. If the mortgagee sue alone, and recover more than his debt, he will hold the surplus as trustee for his debtor.

"It was contended that this rule affords no adequate protection to the mortgagor. The answer to this position is that the demurrer admits that the mortgagor has no interest. It is competent for the defendant to suggest by affidavit or answer that the mortgagor is a necessary plaintiff,⁵³ but he can raise the question by demurrer only when the interest of the mortgagor is obtained in the complaint. Where the mortgagor is not made a party, there is, perhaps, a risk that his interest may not be properly protected, but this may happen to assignors in all actions by assignees; indeed, it may happen in any litigation where there is an outstanding, unapparent interest in one not a party. This is an infirmity of human justice."

We also quote from the dissenting opinion of Judge Orton, who, we think, has stated the better rule of law, one nearer in accord with the decisions of the courts of other states. He said: "The insurance policy was issued to the mortgagor, and the loss made payable to the mortgagee, as his interest may appear; that is, as his interest may appear in and by this suit. What his interest is in the loss is one of the material questions to be determined in this suit, and this question depends upon whether the mortgage has been paid wholly or in part, or is wholly unpaid. The plaintiff, suing as the mortgagee, alleges that he is entitled to the whole loss. Who, besides, is interested in this question, if not the mortgagor? It is said that this averment on demurrer must be taken as true, and that, therefore, the complaint shows that the mortgagor has no interest in the fund, and that he is, therefore, not a proper or necessary party to the suit. This is begging the whole question. The plaintiff occupies a position hostile, and this averment is antagonistic, to the rights and interests of the mortgagor, and the mortgagor is di-

⁵² *Northwestern Mut. Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446; *Grosvenor v. Insurance Co.*, 17 N. Y. 391; *Cone v. Insurance Co.*, 60 N. Y. 619; *Ennis v. Insurance Co.*, 3 Bosw. (N. Y.) 516; *Chamberlain v. Insurance Co.*, 55 N. H. 249.

⁵³ Rev. St. Wis. §§ 2610, 2611.

rectly interested, and alone interested, in controverting this averment, and in showing that the mortgage has been wholly or in part paid, and that the interest of the plaintiff in the fund is less than he avers, or none at all, and that he is alone entitled to the loss, or jointly with the plaintiff. If it is shown that the interest of the mortgagee is less than the whole loss, then the mortgagor will be entitled to the overplus; and if it be shown that the mortgagee has no interest, then the mortgagor will be entitled to the whole loss, and a judgment for the same in this suit. Instead of the averments of the complaint showing that the mortgagor has no interest, they show that he has a direct interest in one of the material questions to be litigated in the suit. But it is said also that the defendant insurance company may by answer controvert this averment of the complaint, and then it may appear by the answer that the mortgagor is interested in the question, and a necessary party. Why so? If the company may, by answer, deny this allegation, and allege the payment of the mortgage wholly, or in part, without the presence of the mortgagor as a party, why may not the company also try the question of fact upon such an issue without his presence? If there can be but one suit on this policy for the loss, and this adjudication is final, and conclusive of the rights of the mortgagor, then the insurance company is indifferent, and has no interest in raising such an issue, and will not make such an issue for and on behalf of the mortgagor. If the mortgagor is not concluded, then he is the only party besides the mortgagee who has knowledge of the facts upon which the allegations necessary to form such an issue could be based. The insurance company surely is not supposed to have such knowledge, but, besides this, in such case the mortgagor should be made a party, so that he may be concluded as well as the mortgagee, and the interests of all parties in the funds be ascertained and adjusted in one suit." Judge Orton then proceeds to say: "No case is cited in which it has been held that the mortgagor in a case like this, when the policy was issued to the mortgagor, and the loss payable to the mortgagee, as his interest may appear, was not a necessary party. All of the cases cited were where the whole loss was payable to the mortgagee. This case must rest alone upon the general principle that all persons interested in the subject-matter of the litigation must be made parties. The interest of the mortgagor

in the subject-matter of this litigation is clearly apparent from the complaint itself, and the defect in his not being made a party to the suit may be taken advantage of by demurrer. This is really the only way in which the defendant would be able to raise the question, and why should not the insurance company be allowed, upon the demurrer to the complaint, to suggest and contend that the complaint shows the mortgagor to be a necessary party, and that he ought to be brought in, in order that a full determination of the whole controversy may be made in this one action against the company? Why should the insurance company be compelled to state facts in an answer of which it has and can have no actual knowledge, in order to show that the mortgagor has an interest in the subject-matter of the suit, where his interest in the question to be litigated, tried, and determined is so clearly apparent on the face of the complaint?"

§ 390. The Proper Person to Sue is the One from Whom the Consideration Moves.

The case of *Chamberlain v. New Hampshire Fire Ins. Co.*⁵⁴ presents a statement of facts different in one important particular from any of the cases reviewed in connection with this discussion. The policy was issued by defendant, insuring John M. White, and made payable in case of loss to James L. Chamberlain, who was a mortgagee. The policy was procured and paid for by Chamberlain, and White, while consenting to the insurance, in fact knew nothing of its terms, and had no part whatever in the negotiations. The policy was for \$1,000, while the debt owing from White to Chamberlain, secured by the mortgage, was only \$600. The defendant claimed that the action could not be maintained in the name of the plaintiff, but the court held otherwise, on the ground, it seems, that Chamberlain was the real party to the contract, the only promisee, and the person from whom the consideration moved. Foster, C. J., said: "The general rule, therefore, applies—and I am not aware that it admits of any exceptions—that the person to sue for a breach of a simple contract must be the person from whom the consideration for the promise moves."⁵⁵ "As the person to sue for the breach of an agreement

⁵⁴ 55 N. H. 249, 4 Ins. Law J. 649.

⁵⁵ Dicey, Parties, 81; Chit. Cont. 62.

must be the person with whom the agreement is made, or, in other words, to whom the defendant has made a promise, it follows that the person to sue for the breach of a simple contract must be the person 'from whom the consideration moves,' since, as already explained, he is the person to whom the law considers the promise to have been made. * * * The principle always holds good, as now settled and established, that no stranger to the consideration can take advantage of a contract, even though made for his benefit, and the consideration must move from the party to sue upon it.⁵⁶

May on Insurance⁵⁷ states the general rule applicable to personal contracts to be: "If assigned, the action for breach must be brought in the name of the assignor, though the promise be to him and his assigns, except where the defendant has promised the assignee to respond to him; but a consent to the assignment is held to be the equivalent of this promise, and so if the policy is made payable in case of loss to a third party, or to bearer."

From an analysis of the authorities examined, we reach the conclusion that in jurisdictions where the rule of the common law has not been changed by statutory provisions an action on contract can only be maintained by the person to whom the promise was made, the person "from whom the consideration moves." Elsewhere, except in Wisconsin, no case has been found where, when the insurance was paid for by the mortgagor, and written in his name, with indorsement, "Loss payable to the mortgagee as his interest may appear," it has been held that an action could be maintained by any other person than the owner of the property.

When the owner of the property is only nominally the insured, the policy being issued in his name, but procured and paid for by the mortgagee, and containing a clause directing, without qualification or restriction, that the loss be paid to the latter, he may recover in a suit brought in his own name. When the insurance is paid for by the owner, and the policy issued to him expresses an agreement to pay the loss to a mortgagee, without any limiting or restricting words, and it appears that the debt secured by the mortgage is greater than the claim for loss under the policy, it is an unsettled question whether the mortgagee, having the beneficial interest, may sue in his own name.

⁵⁶ Dicey, Parties, 81, 85, 136, 137; Leake, Cont. 212, 313. ⁵⁷ Section 446.

§ 391. Who shall Bring Suit.

While there is generally a correct understanding in regard to the form of action and such proceedings as must be had in respect to the remedy applicable to that class of tort feorsors with which the insurer has most frequently to deal, there has been some confusion of ideas and no little contention as to who may sue in certain cases. Under the common law, the party who has suffered the wrong must bring the suit to recover damages. In code states, generally, the party having the beneficial right is permitted to sue. Thus the rule will be if, in a state having a common-law practice, the interest has passed from the person primarily injured by the tortious act to the insurer, who has paid the loss, and is therefore subrogated, the action must begin and proceed in the name of the one who was originally wronged; that is, the insured. It is otherwise in states where the common-law rule has been changed to permit the party having the beneficial interest to sue in his own name. There the insurer, who has paid the loss, and become subrogated to the rights of the insured, may seek reimbursement through an independent action. This proposition, however, it must be understood, is qualified by reason of an important exception. The party through whose wrongful act the loss or damage has been occasioned may not be subjected to the annoyance and cost of defending in a multiplicity of suits. If there is but one tort, there is but one cause of action, and this cannot be divided so as to deprive the tort feorsor from presenting his defense in a single suit.

This was well illustrated in *Norwich Union Fire Ins. Co. v. Standard Oil Co.* The property there insured and subsequently burned belonged to the Goodlander Mill Company, and was valued at about \$60,000. Three-fourths of this sum was insured in different companies, who paid the amounts for which they were severally liable, and the plaintiff in this case brought its action to recover from the defendant, the Standard Oil Company, and others, \$3,000, which it had paid in settlement of loss claim, and for the additional sum of \$3,000 paid the Goodlander Mill Company by the German Fire Insurance Company, who had subsequently assigned its interest to the plaintiff in this action. As the value of the property destroyed was

in excess of the sum claimed in this separate suit, leaving the interests of the Goodlander Mill Company and nine other insurers unsettled, and to be otherwise determined, it was held, for reasons hereinbefore stated, that this action could not be maintained. Judge Caldwell said: "When an insurance company pays to the assured the amount of loss of the property insured, it is subrogated in the corresponding amount to the other's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the insured; in a court of equity or admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name, when it has paid the insured the full value of the property destroyed."⁵⁸

In such an action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company he becomes trustee, and the defendant will be permitted to plead a release of the cause of action from the assured, or to set up as a defense the insurance company's payment of its part of the loss.⁵⁹

In support of this rule, it is commonly said that the wrongful act is single and indivisible, and can give rise to but one liability. "If," says Judge Dillon, in *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*,⁶⁰ "one insurer may sue, then, if there are a dozen, each may sue, and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted,

⁵⁸ 8 C. C. A. 433, 59 Fed. 984. See, also, *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223-235, 11 Sup. Ct. 554, and cases cited; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 643.

But the rule seems to be well settled that when the value of the property exceeds the insurance money paid, the suit must be brought in the name of the assured. *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1, Fed. Cas. No. 96; *Assurance Co. v. Sainsbury*, 3 Doug. 245; *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Me. 253; *Hart v. Railroad Corp.* 13 Metc. (Mass.) 99; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265-278; *Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333; *Fland. Ins. pp.* 360, 481, 591; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, *supra*.

⁵⁹ *Hart v. Railroad Corp.*, *supra*; *Hall v. Railroad Co.*, 13 Wall. 367.

⁶⁰ 3 Dill. 1, Fed. Cas. No. 96.

and so it was held nearly a hundred years ago in a case whose authority has been recognized ever since, both in Great Britain and in this country. * * * The rule that, where the property exceeds in value the amount insured the suit must be in the name of the assured, seems not to rest so much upon the necessity or desirability of exempting the wrongdoer from a multiplicity of suits as upon the peculiar nature of the relation existing between the insured and the insurer. It is held by the supreme judicial court of Massachusetts (*Hart v. Railroad Corp.*, supra) and by the supreme court of the United States (*Hall v. Railroad Co.*, supra) that, in respect to the ownership of the property and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from one who is responsible for this loss. When the insurer pays the assured the full value of the property destroyed, the insurer may maintain an action in his own name against one responsible for his loss, because by operation of law the whole beneficial right to indemnity from the wrongdoer has been vested in the insurer. He is, therefore, the real and only party in interest, and under the Code the proper party to bring the suit; but when the value of the property destroyed exceeds the insurance money paid, the beneficial right to indemnity from the wrongdoer remains in the insured for the whole value of the property, for the unpaid balance due to himself as well as for the amount paid by the insurer, as to which last sum he is chargeable as a trustee.”⁶¹

The Continental Insurance Company issued its policy to Rix Bros., covering \$1,000 on stock of merchandise. The property was afterwards damaged or destroyed by fire in the sum of \$2,698. There was other insurance, and the amount of the Continental Company's liability found on the adjustment of loss was \$866.20. This sum it paid, and received from the insured a subrogation agreement, by the terms of which there was assigned and set over to the C. company (with privilege to sue in the name of the insured, or otherwise), to the extent of \$866.20, any claim which the insured had against H. M. Loud & Son's Lumber Company, through whose negligence and wrongdoing it was alleged that the loss had occurred. It was held that the action must fail, for the reason that the tortfeasor could

⁶¹ *Norwich Union Fire Ins. Soc. v. Standard Oil Co.*, 8 C. C. A. 433, 59 Fed. 984.

not be required to defend in separate suits where there was but one cause of action. The Michigan court said: "It is a well-settled rule that the entire claim or demand arising out of a single transaction, whether in the nature of a contract or tort, cannot be divided into separate and distinct claims, and the same form of action brought for each, or two suits maintained without defendant's consent."⁶²

§ 392. In What Manner the Expenses of Suit are to be Apportioned.

When the insurer pays the loss occasioned by the tortious act of another, and declines to join with the insured to recover from the wrongdoer the value of the property destroyed, and the latter proceeds with his own action, incurring risk, trouble, and disbursements, he must nevertheless declare for the full amount of loss, and from the amount recovered he will be entitled to reimburse himself for all reasonable and necessary expenditures in prosecuting the suit, and what afterwards remains of the sum recovered must be divided as their respective interests may appear. The interest of the insurer will be primary, and determined in most cases by the payment it has made in settlement of the loss.⁶³

§ 393. Written Assignment on Payment of Loss Only Invests the Assignee with an Equitable Right to Cause of Action.

Written assignment on payment of loss only invests assignee with an equitable right to cause of action. In *Over v. Lake Erie & W. Ry. Co.*⁶⁴ the action was to recover for the loss of property belonging to plaintiffs, occasioned, as was alleged, by the negligence of the defendant railroad. The claim was for \$75,000. Of this amount about

⁶² *Herriter v. Porter*, 23 Cal. 385; *Logan v. Caffrey*, 30 Pa. St. 196; *Colvin v. Corwin*, 15 Wend. (N. Y.) 557; *Alcott v. Hugus*, 105 Pa. St. 350; *Smith v. Jones*, 15 Johns. (N. Y.) 229; *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 613; *Continental Ins. Co. v. H. M. Loud & Sons' Lumber Co.*, 93 Mich. 139, 53 N. W. 394.

⁶³ *Aetna Ins. Co. v. Confer*, 158 Pa. St. 598, 28 Atl. 153; *Norwich Union Fire Ins. Soc. v. Standard Oil Co.*, 8 C. C. A. 433, 59 Fed. 984.

⁶⁴ 63 Fed. 34.

one-half was covered by policies of insurance in different companies. After computation of the loss, the insurers paid the amount for which they were severally liable, and, claiming subrogation, received pro tanto a written assignment of plaintiffs' claim against the defendant railroad. The contest to which the decision refers was the right to transfer the case from the state to federal court. We quote from the opinion: "The written assignment executed by Over to the insurance companies gave them nothing beyond an equitable right. Neither at common law nor under our statutes does the assignment of a part of the cause of action for a tort invest the assignee with any part of the legal title. The plaintiff Over still retains the entire legal title to the cause of action. As the owner and holder of the entire legal title to the cause of action, and having also the entire beneficial ownership of the unassigned part of it, he can, in this state [Indiana], as at common law, maintain in his own name an action for the whole amount of the loss.⁶⁵ His right of action is at law, because his title is purely legal. The title and interest of the insurance companies are wholly equitable, and extend to but a part of the cause of action. Can Over, whose right of action is at law, by joining the insurance companies, whose right of action is in equity, deprive the railroad company of the right of removal? He could have brought his suit originally in this court against the railroad company, but it would have to be brought in his name alone. His right of action, being legal, and embracing the entire loss, is separable from the equitable causes of action of the insurance companies. The distinction between actions at law and suits in equity is firmly maintained in the federal system of jurisprudence, and state legislation will not be permitted to alter or abridge this distinction."

§ 394. Action Separable when not Objected to.

In *Mobile Ins. Co. v. Columbia & G. R. Co.*,⁶⁶ the property destroyed by the wrongful act of the defendant was insured by several companies, among which were the plaintiff and the Springfield Fire & Marine Insurance Company. Each of the insurers paid its pro rata of the loss, and received from the insured an agreement to subrogate.

⁶⁵ *Cunningham v. Evansville & T. H. R. Co.*, 102 Ind. 478, 1 N. E. 800.

⁶⁶ 41 S. C. 408, 19 S. E. 858.

The Springfield Fire & Marine brought suit to recover of the railroad company its share of the loss, and, judgment having subsequently been entered, payment was made by the defendant, and afterwards, when an action was commenced by the plaintiffs in this suit, the defendant railway company pleaded in bar the judgment which it had paid in the former action. The supreme court of South Carolina, while admitting the rule as correct, and one that must be adhered to, that the cause of action was single, and that the right of the several insurers to be reimbursed could not be enforced in separate and independent suits, held that, the defendant having failed to plead this defense in the former action, and having voluntarily paid the judgment, such action and judgment would not operate to bar a subsequent suit brought by the other parties in interest. McIver, C. J., said: "It follows that the Springfield Fire & Marine Insurance Company had no right to maintain a separate action either against the defendant company or its lessee to recover its proportion of the loss sustained by the tortious act of the said company, or either of them; * * * hence, when the defendant company permitted the Springfield Company to take judgment against it, from which there was no appeal, and paid the amount recovered, it was practically the same thing as a confession of judgment and a voluntary payment, which, of course, cannot operate as a bar to the present action."

**§ 395. Judgment Annulling Foreclosure and Sale not
Conclusive as to the Invalidity of the Fore-
closure Proceedings.**

The right of the insured to indemnity will not, in most cases, be either confirmed or taken away by judgment in any suit brought after a loss to establish or annul title to the property burned. A judgment, it may be said as a general proposition, can be used to prove nothing for or against any party beyond the sometimes important fact of its own existence. If the land, with the buildings insured, were sold before the fire, without notice to the insurer, and without assignment of the policy to the purchaser, the stipulated forfeiture will not be relieved by a judgment in a subsequent suit between the vendor and vendee, annulling the sale; and when the policy provides against any change of interest or possession, and the

chattels insured are taken into custody of the sheriff under a writ of attachment, regular in form, the fact that such writ did not issue in conformity with the statute, and on being traversed after a loss was dismissed, does not affect the forfeiture, which in no manner depends upon the sufficiency of such writ.

Emma Tierney held a policy of the Phenix Insurance Company covering \$1,000 on a building, which was mortgaged to one Edwin Morris. Before the building mentioned was destroyed by fire, foreclosure had been commenced. The proceedings were on their face regular and legal, resulting in sale and a complete divestiture of Emma Tierney's interest in the property. After the loss, Tierney brought suit to vacate the sale, and Morris, who had been the purchaser, entering no appearance, judgment was had in default, declaring the sale invalid. These proceedings were *res inter alios acta*. The insurer declining to pay loss, suit was brought to recover. The court held that the judgment in the suit of Tierney against Morris could not be offered as evidence to establish the fact that Tierney's interest in the insured property had not been terminated by the foreclosure sale. Corliss, J., said: "The fact which alone will render defendant liable is not the judicial annulment of these foreclosure proceedings, but their actual invalidity. It is possible that they were valid, despite the decree adjudging them to be void. The court in that case may have erred as to the law, and because of this error may have adjudged void a perfectly regular and legal foreclosure.

* * * Had the defendant in this action been heard in the other action on the various grounds on which the foreclosure was annulled, an entirely different judgment might have resulted. * * * To protect strangers to an action against the machinations of those who would seek collusively to bind them by the judgment therein, the only safe course is to adhere rigidly to the general rule that the judgment proves, as against such strangers, merely its own existence."⁶⁷

⁶⁷ Tierney v. Insurance Co. (N. D.) 62 N. W. 642; Mount Vernon Manuf'g Co. v. Summit Co. Mut. Fire Ins. Co., 10 Ohio St. 348.

§ 396. What is Legal Process.

In *Carey v. German-American Ins. Co.*⁶⁸ the defendant insured cranberries stored in warehouse. Stanley, a creditor of Carey, caused to be issued against the property a writ of attachment. In the execution of such writ Carey was dispossessed, and a bailiff put in charge. Soon after, and while thus situated, the berries were destroyed by fire. The policy provided in suitable language that it would become void if there should be any change of possession, either by voluntary transfer or legal process. On subsequent proceedings being had, the writ of attachment was dismissed, for reasons which do not definitely appear in the opinion of the court, and it was therefore claimed by plaintiff that such writ did not constitute "legal process," and hence, as a matter of law, there had been no change of possession by reason of the pretended levy. The court refused to sustain this contention, and held that the writ, having issued under the forms of the statute, was a "legal process," within the ordinary definitions of the term, and within the contemplation of the policy. It said: "When an officer seizes and possesses himself of chattels under a writ in such manner as to enable him to maintain trespass or replevin against a wrongful taker thereof, then it is a sufficient levy and service of the writ. There can be no doubt that the officer here stood precisely in that relation to the property. There can be no question but that Evans, the deputy sheriff, took exclusive possession of the property under the writ, and that a change of the possession of the property took place by 'legal process,' in the language of the condition."

It has been held by the New York court of appeals that a levy under an execution to enforce payment of judgment did not constitute a change of possession within the meaning of the conditions of the standard policy of that state. The clause of the policy referred to reads: "This entire policy, unless otherwise provided, by agreement indorsed hereon or added hereto, shall be void * * * if any change other than by the death of the insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal

⁶⁸ 84 Wis. 80, 54 N. W. 18.

process or judgment, or by voluntary act of the insured or otherwise." The property covered by the policy was a stock of merchandise, of the value, it was alleged, of \$11,000. The amount demanded to satisfy execution was about \$1,000. The levy was made in legal form, and the key of the store taken by the sheriff, who was charged with the execution of the writ. It was the opinion of the court that any change of possession that did not result in an increase of hazard would not create a forfeiture, and whether the hazard had been so increased would be a matter for the jury to determine.⁶⁹

§ 397. The Garnishee must Act in Good Faith in Respect to all Parties.

In an attachment suit, where the insurance company is served as garnishee, there frequently come to exist troublesome complications that require long-continued attention, with disbursements for costs, where there are no compensating advantages, and this, too, after the loss has been adjusted, and the liability of the company definitely fixed. In these contests the insurance company has nothing to gain, but the chances are that it will lose both patience and money. The difficulty generally proceeds either from the fact that the principal defendant is a nonresident, and the court from which the attachment issues has obtained no jurisdiction of his person, or that there are several suits in different states, each claiming the res. Attachment suits are commenced by summons, the same as other actions. The garnishee proceedings are ancillary, but, if the defendant is a nonresident, and personal service cannot be had, then service is made by publication; but, if defendant does not appear and answer, judgment cannot be taken for a larger sum than the value of the res in possession of the court, and in that event it will become the duty of the garnishee for his own protection to examine carefully into the regularity of the proceedings by which he is brought within the jurisdiction of the court. The affidavit of the plaintiff and the bond which are required must be made according to the statute, and all things done in conformity to law, otherwise a payment of the judgment entered against the garnishee in certain contingencies will leave him still liable to the principal debtor, whose money or prop-

⁶⁹ Walradt v. Insurance Co., 136 N. Y. 375, 32 N. E. 1063.

erty it is his misfortune to hold. The pathway in which the garnishee is required to walk is frequently one of doubt and peril. In contemplation of the law, the garnishee is no more than a stakeholder, and must act in absolute good faith towards both parties, between whom he stands. He has no right to waive service, or to volunteer anything that may be to the prejudice of the principal debtor.

Waples on Attachments * says: "It is often of the highest importance, involving the garnishee's future protection, that he should resist improper and illegal inquisition. He should not do unnecessary things which might afterwards be charged to have been voluntary disclosures."

When the court obtains jurisdiction by personal service of the debtor, and he appears and answers, the garnishee has no duty to perform in respect to the trial of the case, and he need not inquire into the sufficiency or the regularity of the statutory bond and affidavit preliminary to the issue of attachment. Where an insurance company is garnished in different states for the same debt, that judgment obtained in the suit where service was first had will hold, and the others will fail.⁷⁰ The constitution of the United States provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. In the case of *Peck v. Jenness*,⁷¹ Justice Grier, of the United States supreme court, said: "It is a doctrine of law too long established to require a citation of authorities that where a court has jurisdiction, it has a right to decide every question which comes in the cause, and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as bind-

* Section 356.

⁷⁰ When the subject-matter has been submitted to a court of competent jurisdiction, and the right of the plaintiff to prosecute his suit in that court has attached, that right cannot be arrested or taken away by subsequent proceedings of another court. Thus, A. sues B. in Kentucky, and recovers judgment, which he immediately assigns. Ten days before entry of such judgment, M. institutes attachment proceedings in Ohio, and B. is served with notice of garnishment. Held, that it is the prior pendency of a suit involving the same subject-matter that determines the tribunal to which the defendant has a right to submit the conflicting claims of pursuing creditors. *Mack v. Winslow*, 8 C. C. A. 134, 59 Fed. 316.

⁷¹ 7 How. 624, 625; *Traders' Ins. Co. v. Chase* (Tex. Civ. App.) 31 S. W. 1103.

ing in every other court; and that, where the jurisdiction of the court to the right of the plaintiff to prosecute in it has once attached, it cannot be arrested or taken away by proceedings in another court." The correctness of this principle has been affirmed so many times, and by so many different courts, that it is no longer a matter of dispute.

§ 398. When the Court Having Jurisdiction Refuses to Recognize Exemption Laws of the State where the Debtor Resides.

That is a difficulty for which there appears to be no remedial provision, and it may be the cause of much injustice. Conflict grows out of the different statutes of different states in regard to such exemption. Take, for instance, the state of Wisconsin, where the exemption laws are more liberal than in Illinois. Suppose, for illustration, an insurance to have been upon a building which was exempt under the homestead law of Wisconsin. The courts of that state and others have held that when the property insured is exempt by law the money due from the underwriters on account of the burning of the property is also exempt. But suppose the company is garnished in Chicago, and that under the statutes of Illinois the property would not be exempt; judgment is taken and the garnishee is held under the law of Illinois. The person insured, who is the principal defendant in the attachment suit in Illinois brings suit in Wisconsin, and collects in the courts of that state under the policy. Here are two payments on the part of the insurance company for one debt. This is not altogether a hypothetical case; something quite like this occurred several years ago. It was in the case of *Roche v. Rhode Island Ins. Ass'n*,⁷² and the liability of the garnishee was ultimately decided by the appellate court of this state. Waples says that "to the rule of comity established by the constitution of the United States there is this exception: no court is bound to give faith and credit to the judgments rendered in other states when their enforcement would be violative of the policy or judicial morality of its own state."

⁷² 2 Ill. App. 360.

§ 399. The Garnishee may Replace the Property Burned, and when This is Done will be Discharged.

A garnishee cannot be held when the debt which he owes, and on account of which the proceedings are had, is not absolute. It must be a fixed quantity, an obligation definite in its character, though, perhaps, payable at some future time; but it must in no way be subject to any contingency. Nearly all policies of insurance contain a provision that the company, in event of a loss, may rebuild or replace the property burned; and, if the company is garnished without having first exercised its option, or before such option has expired by the terms of the policy, it cannot be held. In *Bowen v. Pope*⁷³ the court was clearly of the opinion that an insurance company could not be held as garnishee while an option existed to replace the property; and a query is here presented whether it would be subject to garnishment if the loss had occurred in a state beyond the jurisdiction of the court, and the company should elect to replace the property destroyed. If the subject of insurance were either a building or merchandise, it would, necessarily, in replacement be delivered by the insurer in the performance of its full obligation at the situs of the loss, and outside of the jurisdiction of the court where the insurer was summoned as garnishee. I do not recollect any case where a question in this form has ever been presented; but, applying the general principles of the law to the clearly expressed right of replacement by the insurer, the conclusion is inevitable that the garnishee must be permitted to carry out its spe-

⁷³ *Bowen v. Pope*, 26 Ill. App. 233. See, also, *Elliott v. Preston*, 44 Mich. 189, 6 N. W. 238; *Godfrey v. Macomber*, 128 Mass. 188; *Martz v. Insurance Co.*, 28 Mich. 201.

In each of the above cases it was held that the company was not subject to garnishment, so long as its option to replace continued.

In *Hurst v. Insurance Co.*, 81 Ala. 174, 1 South. 209, 16 Ins. Law J. 688, the insurer had given notice to claimant of its election to replace. It was held that no judgment could be entered against the garnishee defendant, and that proceedings would be stayed, pending performance, under its election to replace.

After an election to rebuild, insurer is not liable to garnishment. *Stone v. Insurance Co.*, 22 Atl. 1051, 74 Md. 579.

cific engagements by restoring in kind to its policy holder the building or merchandise burned, when it so elects. If this is a correct construction of the law as applied to the insurance contract, then the replacing of merchandise does not signify an indebtedness of a certain sum of money, but so many pounds of sugar and coffee, or so many yards of cloth or suits of clothing, to be delivered at the place of the fire, in a foreign state, and outside of the jurisdiction of the court. What necessity does this class of cases between the debtor and the creditor present that will justify the courts in interfering to deprive an insurance company of a valuable right, secured by the contract itself? The proposition is well established that a garnishee cannot be put in a worse position in respect to its rights on account of the attachment proceedings than it would otherwise have occupied. The privilege of rebuilding or replacing cannot, then, be taken away; and when this occurs in a foreign state an insurance company cannot be held as a garnishee, unless the right of replacement has been voluntarily surrendered or terminated under the limitations of the contract. A contingent liability affords no grounds for a garnishment. This proposition, I believe, stands undisputed.

In *Moshassuck Felt Mill v. Blanding*⁷⁴ the garnishee defendant was the British America Assurance Company, whose home office was at Toronto, Canada, at which place, by the terms of the policy, the loss was payable. The question was raised and considered by the Rhode Island court whether, by service of the writ of attachment, jurisdiction had been acquired over the garnishee. The court decided that such jurisdiction had been obtained, and based this conclusion on the fact that the British America Assurance Company, in compliance with one of the conditions on which it was permitted to transact business in Rhode Island, had appointed the commissioner of insurance of that state as its attorney on whom the service of any legal process could be made. We quote from the opinion. The contention is that "the money due from the garnishee to the defendant is payable at Toronto, Canada, where the corporation is established, and that, therefore, the court by garnishment has acquired no jurisdiction over it, and cannot charge the garnishee on account of it." There is much force in this contention, and there are many cases which sustain such a view, where there is no statute providing for

⁷⁴ 17 R. I. 297, 21 Atl. 538.

the service of process on foreign corporations. But in states where such service is provided for, the jurisdiction, so far as we are aware, has been uniformly asserted.⁷⁵

In *Roche v. Rhode Island Ins. Ass'n*⁷⁶ it was held by the appellate court of Illinois that in such case the foreign corporation becomes, for all purposes of suit, a resident corporation, and that the debt due from such corporation, though payable elsewhere by the terms of the contract under which it fell due, was nevertheless subject to garnishment in that state.

§ 400. The Insurer as Garnishee will be in Peril when the Court Wrongfully Takes Jurisdiction of the Case.

Where an insurance company is a garnishee, and the defendant a resident of another state, it is important to the company that the court obtains jurisdiction, otherwise the insurer, having paid as garnishee, may be held liable again, in a suit brought on the policy, at the domicile of the nonresident. When the defendant appears, the garnishee is relieved from any duty to inquire concerning the regularity of such proceedings as have been taken to give the court jurisdiction. If the defendant is a nonresident, and does not appear, the garnishee may protect itself by raising the question as to the sufficiency of service and other proceedings on which rest the right of the court to take jurisdiction of the case.

In *Pierce v. Carleton*,⁷⁷ Treat, C. J., said: "If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary, and not as a compulsory, payment, and the defendant might compel him to pay a second time. It is clear, therefore, that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case."

When the court has jurisdiction, the garnishee may continue an in-

⁷⁵ *Fithian v. Railroad Co.*, 31 Pa. St. 114; *Barr v. King*, 96 Pa. St. 485; *Roche v. Association*, 2 Ill. App. 360; *Selma, R. & D. R. Co. v. Tyson*, 48 Ga. 351; *McAllister v. Insurance Co.*, 28 Mo. 214; *Bank v. Huntington*, 129 Mass. 444; *Cousens v. Lovejoy*, 81 Me. 467, 17 Atl. 495.

⁷⁶ *Supra*.

⁷⁷ 12 Ill. 358.

different spectator of the subsequent proceedings. He is then no more than a stakeholder, and must act in relation to both parties with strict impartiality. Errors and irregularities that may thereafter come to exist cannot be attacked collaterally by any one. They affect only the defendant, and can be called into question only by him. Judgment entered, therefore, against the garnishee by a court having jurisdiction of the cause, can be pleaded in bar or abatement of suits subsequently brought elsewhere, under the clause of the constitution requiring that full faith and credit shall be given in each state to the judicial proceedings of every other state. But a question of greater difficulty, and one concerning which the courts have not always been in accord, may arise from the circumstances under which the res of the defendant are seized, and no personal service obtained.

§ 401. The Situs of a Debt is the Place where Its Owner Resides.

Recent authorities are clearly in support of the doctrine that the situs of the debt is the place where its owner resides, and that service of garnishment on the debtor, who lives in another state, where the process issues, will not confer jurisdiction upon the court. *Reno on Nonresidents*⁷⁸ says: "A debt for purposes of attachment, as well as for many other purposes, has its situs at the residence of its owner, the creditor; that his state has exclusive jurisdiction over the debt, and that, therefore, no other state has the power to attach it."⁷⁹

It is by proceedings quasi in rem, in case of garnishment, that the court acquires jurisdiction of a nonresident defendant, and, if the situs of the debt be at the residence of the defendant, the court does not get control of the res, and is without jurisdiction. This rule is not changed by the fact that the garnishee lives in the state where the

⁷⁸ Section 138.

⁷⁹ *Bowen v. Pope*, 125 Ill. 28, 17 N. E. 64; *Bates v. Railway Co.*, 60 Wis. 302, 19 N. W. 72; *Sutherland v. Bank*, 78 Ky. 253; *Plimpton v. Bigelow*, 93 N. Y. 596; *Pennoyer v. Neff*, 95 U. S. 724; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Lovejoy v. Albee*, 33 Me. 414; *Nye v. Liscombe*, 21 Pick. (Mass.) 263; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430; *Green v. Bank*, 25 Conn. 452; *Sawyer v. Thompson*, 24 N. H. 510.

process issues. The location of the res controls, and, that being the domicile of the creditor, and not of the debtor, the proceedings are a nullity.

This question was exhaustively discussed by the supreme court of Kansas in the case of *Missouri Pac. Ry. Co. v. Sharitt*.⁸⁰ Sharitt had earned wages of the railway company while employed in the state of Kansas. He owed a debt to one Stewart, living in Missouri, who garnished the railway company in his own state, serving Sharitt only by publication, in accordance with the statutes of Missouri. No attention was given to these proceedings by the nonresident defendant, who subsequently brought suit in Kansas to recover from the railway company. This last action was sustained. Valentine, J., in his separate opinion, said: "The debt is really and in fact a mere chose in action, arising wholly in parol, and is of such an intangible character that it could not be actually seized by any kind of process, and it can hardly be said to have any actual situs anywhere; but, if it should be considered as having an actual situs anywhere, then its more natural situs is where it is to be paid,—in Kansas, and to Sharitt. It is seldom, and perhaps never, held that property in a debt, a mere chose in action, can be carried around with the debtor wherever he may go, and exist wherever he may be."⁸¹ But on the contrary, the situs of a debt is generally held to be with the creditor."

This view of the law was sustained ⁸² in *Connor v. Hanover Ins. Co.*

In discussing the case, *State Tax on Foreign-Held Bonds*,⁸³ Justice Field said: "To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due."

⁸⁰ 23 Pac. 430, 43 Kan. 375.

⁸¹ *Drake*, Attachm. §§ 474, 481; *Wade*, Attachm. 344; *Wheat v. Railroad Co.*, 4 Kan. 317.

⁸² 28 Fed. 549.

⁸³ 15 Wall. 320.

§ 402. When the Court will not Obtain Jurisdiction.

In *Reiner v. Hurlbut*⁸⁴ the plaintiff, a resident of Wisconsin, had obtained judgment against the Dwelling-House Insurance Company, of Boston, Mass. The St. Paul Fire & Marine Insurance Company, of Minnesota, subsequently commenced an action in Chicago, Ill., against Reiner, the plaintiff in this suit, and garnished the Dwelling-House Insurance Company by service of process on its Chicago agent. No service was had on Mrs. Reiner other than the usual publication under the statutes of Illinois. She did not appear in the Chicago suit, nor give any attention to the proceedings there instituted. The Wisconsin supreme court held, as we think, with excellent reason, that the Illinois court failed to acquire jurisdiction. Cassoday, J., who wrote the opinion, said: "The question recurs whether, at the time of such garnishment, Mrs. Reiner was the owner of any property, assets, or credits within such jurisdiction of the Chicago court. There is no pretense that at the time the garnishee papers were served upon the Chicago agent of the Boston company he had in his possession, or under his control, any tangible property belonging to Mrs. Reiner. The extent of the claim is that at that time the Boston company was indebted to Mrs. Reiner upon the judgment mentioned, and hence that such indebtedness was attached or reached by the service of the garnishee papers upon the Boston company's agent in Chicago. If such contention can be maintained, then it is obvious that the St. Paul company might have attached such indebtedness by such garnishee proceedings in any state or city in the Union where the Boston company happened to have an office and an agent. This would necessarily be upon the theory that such indebtedness to Mrs. Reiner was ambulatory, following each of the several agents of the Boston company, and, for the purposes of garnishment, having a situs with and in the office of each and all such agents, wherever they happened to be located. If such is the law, it is certainly important that all should know it."

The court then enters upon a discussion of the legal questions involved, and expresses in vigorous and distinct phrase its conclusion that jurisdiction of a nonresident debtor cannot be acquired in that

⁸⁴ 81 Wis. 24, 50 N. W. 783.

manner, citing the case of *Tingley v. Bateman*,⁸⁵ where it was declared that a chose in action of this species, when arrested by garnishee proceedings, must, for such purpose, be considered as local, remaining at the domicile of the debtor, and not following him from place to place, wherever his pleasure or the convenience of his business requires him to go. Judge Cassoday then adds: "The only exception to this rule seems to be when tangible property, belonging to the principal defendant, has been actually seized within the state, or the contract or promise is to be performed within the state. * * * If the indebtedness of the Boston company to Mrs. Reiner had any situs outside of Wisconsin for the purposes of garnishment, it was at the home office of that company in Massachusetts; certainly not with the respective agents of that company, wherever located in the several states."

§ 403. When Defendant is a Nonresident, and not Personally Served, the Court will not Get Jurisdiction.

When the insurer is garnished in a suit where the defendant is a nonresident, and no service obtained that will give the court jurisdiction, the proceedings are void, and any judgment entered against the garnishee cannot be pleaded in bar or abatement of a suit brought by the insured on the policy. Compulsory payment in such cases would be clearly in contravention of the constitutional provision that no person shall be deprived of his property except by due process of law.

While jurisdiction must in all cases be acquired in a manner not in contravention of local law, to proceed in strict conformity with such law will not be sufficient if the nonresident is thereby defrauded of a valuable constitutional right, as would occur in the case of a sub-

⁸⁵ 10 Mass. 346.

In *Continental Ins. Co. v. Chase* (Tex. Civ. App.) 33 S. W. 602, the court said: "We are of the opinion that the courts of New York and Rhode Island had no jurisdiction over this fund, nor over the claim of Chase thereto. It was a Texas transaction. The policy having been issued here, to be paid here in case of loss, no liens could be fixed upon it by the process of any foreign courts. They would have to come here, and have their rights determined by the courts of this state."

stituted service. In many states it is provided by statute that in the commencement of an attachment suit the property of the foreign debtor found within the jurisdiction of the court may be detained, and the service completed by publishing notice of the seizure. This will be sufficient when the process of the court reaches (and actual possession is secured) tangible property, for the law assumes that persons have, either absolutely or in some qualified manner, possession and control of that which they own, and that seizure under legal process imparts notice to the defendant in the suit. But this presumption does not exist when a debt owing to a nonresident defendant is attached by garnishment. It is not, as Justice Field said, tangible property in the hands of the garnishee. Proceedings in this class of cases are only quasi in rem, and when local laws authorize service to be obtained in the manner here designated they are violative of that clause of the fourteenth amendment of the constitution which provides that "no state shall deprive any person of life, liberty, or property without due process of law," and, being such, are void.

In *Davidson v. New Orleans*,⁸⁶ Justice Miller said: "Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition of the statutes is of no avail, or has no application, where the invasion of private rights is affected, under the forms of said legislation."

§ 404. Where is the Place of the Contract?

The law of the place where the contract is made, and not the place of performance, will generally control. The rule followed by the courts with great uniformity is, when the contract has a personal character, its validity and construction will depend upon the law of the place where it is made; but when the contract refers to interests in real estate it will be construed and enforced according to the local laws of the place where the property is situated. Property insured in most instances has a fixed location. This is true as well in regard to chattels as real estate, but it is important to a correct application of these well-established rules that we do

⁸⁶ 96 U. S. 97.

not lose sight of the fact that the contract of insurance is always personal, whether the subject of the policy be real estate or chattels. The promise to indemnify is the same in both instances, and the obligation and manner of performance are in no respect changed or qualified by legal distinctions or rules of law affecting these different classes of property.

In a determination of the question as to the place of the contract, the location of the property insured will generally have no special significance. In *Marden v. Hotel Owners' Ins. Co.*⁸⁷ the building insured was situated at Kearney, Neb. The parent office of the insurer was at Creston, Iowa, in which state suit was brought to recover for a loss under the policy. The principal question involved in the contest was whether the rights of the defendant under the contract could be limited by the operation of the local statutes of Iowa. The Hotel Owners' Insurance Company was not by the laws of Nebraska permitted to do business in that state, but its secretary went to Kearney, met Marden, solicited and obtained the insurance on the building. A note was given for the premium, payable at Creston, Iowa, where the policy was issued. The supreme court of Iowa said: "There was no completed contract in Nebraska. It was a mere verbal arrangement or agreement to issue a policy in Iowa. The policy having been issued in pursuance of the verbal arrangements, the contract was executed and to be performed in this state, and it is to be construed and controlled by our laws."⁸⁸

The defendant in this suit was a mutual company, and the record does not disclose whether or not the secretary, who took the application and accepted the note for the premium, had authority to make a completed contract. If such power had been conferred on the secretary, the court did not find it necessary to consider in what manner or to what extent his acts may have affected the question of whether the contract was made in one state or the other. It appears to have based its conclusions chiefly on the facts that the policy was issued in Iowa, and that the premium note was payable there. These facts may be regarded as conclusive, as there had been a fail-

⁸⁷ 85 Iowa, 584, 52 N. W. 509.

⁸⁸ *Arnold v. Potter*, 22 Iowa, 194; *Ruse v. Insurance Co.*, 23 N. Y. 516; 2 Pars. Cont. p. 582.

ure to show that the secretary possessed such general powers as would enable him to bind the company by his parol agreements in regard to a completed contract. If the secretary had acted with full authority, and the "verbal arrangements" to which the court refers had proceeded so far that the courts would have compelled the defendant company to issue a policy in conformity with such "verbal arrangements," it is quite clear that the contract had been made at Kearney, Neb., and the fact that the note was payable at Creston, Iowa, and the policy issued there was not, I think, important. The Hotel Owners' Insurance Company not having authority to insure property in the state of Nebraska, the secretary, we may presume, had no larger powers in respect to this particular matter than an ordinary soliciting agent, and that his agreements with plaintiff, although perhaps sufficient, if he had been acting with authority, to bind his company by parol to insure, had not such legal effect.

In *Equitable Life Assur. Soc. v. Pettus*⁸⁹ the important matter of contention related to whether the contract was made in New York or Missouri. The policy was issued at the office of the company in New York, but the insured lived in Missouri, where the application was taken by the company's solicitor, and where the premium was paid. In the application it was stipulated that the contract "shall not take effect until the first premium shall have been actually paid." The policy was forwarded by the company to its agent or solicitor in Missouri, and by him delivered to the insured. Justice Gray, in handing down the decision of the United States supreme court, said: "Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri, and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

Under a very similar statement of facts, the United States circuit court of appeals decided the case of *Knights Templar & Masons' Life Indemnity Co. v. Berry*,⁹⁰ and the same rule of construction was followed. These late decisions of the federal courts are in direct contravention to a line of very eminent authorities, both English

⁸⁹ 140 U. S. 226, 11 Sup. Ct. 822.

⁹⁰ 1 C. C. A. 561, 50 Fed. 511.

and American.⁹¹ In *Desmazes v. Insurance Co.*⁹² the domicile of the company was Newark, N. J., where the policy was issued, and sent to its agent at Boston, Mass., who delivered it to the insured, and collected the premium. This agent had no authority from the company either to make or alter a contract. Justice Clifford, of the United States circuit court, after a very full discussion of the facts and the law, stated his conclusions to be that the contract was made in New Jersey. His judgment on this point appears to have been based principally on the fact that the whole business of the company was done at its office in Newark; that its Boston agent had no duty to perform, in respect to the policy and the payment of the premium, beyond carrying out specific instructions which he received from the Newark office; that the premiums were payable at Newark, and losses paid there.⁹³

Where the policy is issued and countersigned by an agent having general powers (that is to say, one who has authority to bind his company by a completed contract), it cannot be successfully contended that the place of the contract is not at the residence of the agent, and that in its construction the law there existing will not prevail.⁹⁴

§ 405. Parties to a Contract may Agree as to the Time when an Action to Enforce its Provisions shall be Barred.

The insurance policy usually contains a stipulation limiting the time within which an action can be brought to recover any claim for loss. The courts have uniformly held that such stipulation is proper and lawful unless specially forbidden by statute, as is the case in several states. The propriety of such a provision is generally recognized, in view of the fact that many fires have a fraudulent origin, and that the evidences of crime will be lost in a large propor-

⁹¹ *Whitcomb v. Insurance Co.*, 8 Ins. Law J. 624, Fed. Cas. No. 17,530; *Desmazes v. Insurance Co.*, 7 Ins. Law J. 926, Fed. Cas. No. 3,821.

⁹² *Supra*.

⁹³ *Hyde v. Goodnow*, 3 N. Y. 266; *Western v. Insurance Co.*, 12 N. Y. 258; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626.

⁹⁴ *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416; *Heebner v. Insurance Co.*, 10 Gray (Mass.) 131; *Bailey v. Insurance Co.*, 56 Me. 474; *Pomeroy v. Insurance Co.*, 40 Ill. 398.

tion of cases when a long time intervenes between the fire and a suit to recover. Besides, there will always exist difficulties in proving values, and in definitely arriving at the rights of the parties, when the recollection of important facts and circumstances is impaired or wholly lost from the minds of the witnesses, on whose testimony reliance is placed to establish a claim, or to defeat a fraud. The agreement, therefore, that suit shall be barred, unless brought within a specified period, has always been regarded by the courts with favor, as tending to establish justice on a surer foundation, and relieve judicial inquiry from much of the uncertainty that always results when its judgments are based upon the evidence of obscurely remembered facts,—things that frequently remain in the minds of disinterested witnesses only as dim nebulosities. The purpose of law is to preserve just and peaceable relations between the individual members of society. Courts are provided to hear and determine matters of dispute in an equitable and orderly manner, that would otherwise become often the subject of force and violence. It is to protect the weak against the strong and prevent strife that lawful means of settlement are instituted, and the courts will favor such agreements between individuals as tend to make the performance of judicial duties lighter and less complicated, and without strife to accomplish more satisfactorily the peaceable and orderly purpose for which laws are enacted, and courts organized. The necessity of limiting a right of action is recognized by statute in all the states; in fact, it is a principle deeply rooted in the common law. When a person has neglected to assert his rights for a specified time, afterwards the law will not aid him in doing so. He will not be allowed to wait, and by his inaction lead the person having an adverse interest to suppose that he acquiesces in existing conditions, until witnesses have died, and such changes have occurred as to leave no traces of fraud, if any existed, and then bring the matter into court for adjudication. The limitations imposed by statute are generally from six to ten years, but the courts have held, almost without dissent, that parties may agree between themselves to shorten this time to any period that will comport with their convenience or be best suited to the special character of their engagements.

We have already adverted to some of the chief reasons why a person claiming loss should be required to bring his action to recover within a shorter period than that generally made obligatory by statute. The law creates a bar in reference to a large class of cases, contemplating the extreme indulgence which should be granted to the sick, the absent, the ignorant, or the indifferent, with the right that in all cases the term of limitation may be made less or greater by contract stipulation. There is, perhaps, no special case where this right may be claimed with better reason than in respect to a suit for the recovery of a loss under a policy of insurance, and this view of the matter has been generally taken by the courts, as will hereafter appear.

**§ 406. When the Stipulation Limiting Time within Which
Suit may be Brought is Waived.**

But this, the same as all other rights created by contract, may be waived, and such waiver may be either expressed or implied; and when the insurer by word or act justifies the insured in believing that the claim will be paid, and causes him to delay bringing suit until after the expiration of the time, such conduct has been held to be a waiver of the policy condition requiring suit to be brought within a specified time.⁹⁵

**§ 407. When the Stipulation Limiting Time within Which
Action can be Brought is not Waived.**

There will, however, be no waiver unless the act or declaration of the insurer fully warranted the belief on the part of the insured that payment would be made without suit, and it was held in *Brady v. Insurance Co.* that the circumstances must be such as to amount to fraud on the part of the insurer pleading such delay in avoidance of liability.⁹⁶

⁹⁵ *Peoria Fire & Marine Ins. Co. v. Hall*, 12 Mich. 202; *Mickey v. Insurance Co.*, 35 Iowa. 174; *Curtis v. Insurance Co.*, 1 Biss. 485, Fed. Cas. No. 3,503; *Brady v. Insurance Co.*, 17 U. C. (C. P.) 597; *Ripley v. Insurance Co.*, 17 How. Prac. (N. Y.) 444; *Coursin v. Insurance Co.*, 46 Pa. St. 325.

⁹⁶ 17 U. C. (C. P.) 597. The usual negotiations, concerning settlement, arbitration, etc., do not, in the absence of fraud, waive or otherwise defeat the

§ 408. When Term of Limitation Begins to Run.

The courts have not always concurred in regard to the time when the term of the limitation begins to run. In many instances where this question has been presented for their consideration, the limiting clause read as follows: "No suit or action against this company for recovery of any claim by virtue of this policy shall be sustainable, unless such suit or action shall be commenced within twelve months after the loss occurs." This clause involves no difficulties of construction except when considered in connection with the stipulation in regard to proofs of loss, which usually expresses that the loss shall not be due and payable until 60 days after satisfactory proofs are received at the company's office. The disagreement of the courts has been as to when the loss, within the meaning of the policy, occurs,—whether it is at the time the property insured was damaged or destroyed, or when the insurer becomes liable for payment; that is, 60 days after sufficient proofs have been furnished. We think the construction which makes the "loss to occur" at the time of the fire expresses the more obvious intention of the parties, and the weight of authority appears to be in support of this opinion. In several states, however, it has been held otherwise.⁹⁷

When the policy provides that no suit shall be sustained unless brought within the time specified,—as six months or a year after the date of the fire,—there is no disagreement among the authorities but that the limitation will begin to run from the time of "the fire." It was held in *Peoria Marine & Fire Ins. Co. v. Whitehill*:⁹⁸ "Where an insurance company shall by fraud, or by holding out reasonable hopes of an adjustment, deter a party assured, being under such a condition to sue, from commencing his suit, he honestly con-

limitation clause of the policy. *Gooden v. Insurance Co.*, 20 N. H. 73; *Underwriters' Agency v. Sutherlin*, 55 Ga. 266; *Waynesboro Mut. Fire Ins. Co. v. Conover*, 98 Pa. St. 384, 11 Ins. Law J. 413.

⁹⁷ See *Steen v. Insurance Co.*, 89 N. Y. 315; *Fullam v. Insurance Co.*, 7 Gray (Mass.) 61; *Ellis v. Insurance Co.*, 64 Iowa, 507, 20 N. W. 782; *Miller v. Insurance Co.*, 70 Iowa, 704, 29 N. W. 411; *Mix v. Insurance Co.*, 9 Hun (N. Y.) 397; *German-American Ins. Co. v. Hocking*, 115 Pa. St. 398, 8 Atl. 586; *Meesman v. Insurance Co.* (Wash.) 27 Pac. 77.

⁹⁸ 25 Ill. 382.

finding in the pretenses and promises of the assurer, the condition will be no bar." The same court says:⁹⁹ "It is not easy to see that the stipulation in question is against public policy, or unjust, or in conflict with any positive requirement of law. On the contrary, it is for the interest of insurance companies and the public that the exact condition, the precise extent of the liabilities of these companies, should be known. That such may be the case, it is necessary that losses covered by policies should be speedily adjusted and paid. Six months would seem to be long enough and reasonable time to enable the parties sustaining the loss to ascertain and present it to the company for payment, and to sue for it if not paid."

In *Davidson v. Phoenix Ins. Co.*,¹⁰⁰ Mr. Justice Field, while discussing the stipulation incorporated in an insurance policy, limiting the time within which an action thereon could be commenced, said: "That the condition is valid, there can be no reasonable doubt. There is nothing in it against law or public policy. It rests upon the same grounds as other conditions, such as requiring notice of losses, and a detailed statement of the particulars. Its object is not to deprive the legal tribunals of their proper jurisdiction, but to compel an early resort to them when claims for losses are disputed, or an abandonment of the claims. It may, in many instances, be of great importance to the company that such claims be prosecuted as speedily as possible, whilst the facts are fresh in the recollection of witnesses, and their testimony can be readily obtained. The greater the delay, the greater will be the difficulty of detecting frauds on the part of the insured, or of ascertaining the actual extent of the losses incurred."

No court, so far as my inquiry reaches, has ever held that parties may not agree as to the time within which suit must be brought to recover on a contract, except in states where such agreements are forbidden by statute. The stipulation contained in the insurance policy, barring suit after six or twelve months, is founded on considerations of exceptional character and importance. When a loss occurs, the subject on which the liability of the insurer arises may, and in most cases does, pass out of existence. This, of course, always happens if the property insured is totally destroyed. If it be a

⁹⁹ 25 Ill. 390. See, also, *Grant v. Insurance Co.*, 5 Ind. 23.

¹⁰⁰ 4 Sawy. 594, Fed. Cas. No. 3,607.

building, and damaged only, occupation and use require that it be repaired; and when the injury sustained is to merchandise, it will generally be necessary to sell or otherwise dispose of it to prevent further loss. Thus it generally occurs that the material, visible, and substantial evidences of damage, the circumstances of the fire, and the loss resulting, are obliterated. Nothing remains but the contention of the parties and the recollection of witnesses as to the facts which had their attention on the occurrence of the disaster. The recollection of the parties interested may continue for months, or even years; losing, however, in some particulars and gaining in others. In such cases it will often be the case that interest will gradually produce such a character of mental bias as to give to certain facts an exaggerated importance, while others will lose in color and effect. Difficulties of this kind will be presented in a majority of cases where a very long time intervenes between a fire and an action brought to recover on the policy. In the case of disinterested witnesses, having no strong motive to quicken memory or to stimulate recollection, it will usually be found that after long periods they have forgotten more than they have remembered, and their evidence will be as unreliable and unsatisfactory as that of the parties to the suit. But there is another and a paramount reason, so far as the insurer is concerned, why there should be no unreasonable delay in bringing suit. The insurance company, from the nature and wide extent of its business, is compelled, where loss is claimed, in many instances to rely on the investigation and estimate made by adjusting agents. Over these it has no permanent control. An agent appointed to inquire into the circumstances and to compute damages in any particular case is frequently the only person, in the event of a suit, on whom the company can rely to prepare and present its defense understandingly. He only has met the claimant, and attempted negotiations of settlement; he alone has seen what was saved of the property insured, and has examined personally the evidences of loss or fraud. His frequent interviews with the claimant while negotiations were continued, having in view an ultimate settlement, may have been important, and the company must rely chiefly on his recollections for a definite and faithful statement of what took place. The employment of this adjuster may have been temporary, his connection with the insurer

relating only to a particular claim, and subsequently engaged with duties in other and possibly remote places. The condition of the insurance policy, requiring suit to be brought within a specified time, it will be seen, therefore, recognizes a necessity for prompt action; a necessity that is in an important and special sense an incident to a business of this peculiar character.

§ 409. What Facts do or do not Constitute a Waiver of the Condition.

The fact that there have been, frequently, interviews between the parties, and attempts made by the insurer in good faith to negotiate a settlement, will not imply a waiver of the condition requiring suit to be brought within a specified time. There must be some word spoken or act performed by the insurer to fairly induce a belief in the mind of the insured that the condition will not be insisted on. In *McFarland v. Peabody Ins. Co.*¹⁰¹ defendant's agent, soon after the fire, met the plaintiff, and offered settlement on the basis of compromise, which was declined. Later the plaintiff visited the office of the company at Wheeling, and had an interview with the secretary, and was told that the company would write him as to its intentions. This, however, they neglected to do, and something like eight months afterwards plaintiff was again in Wheeling, and on visiting the office of the company was told by its officers that, as he had brought suit, they preferred to pay, if at all, after judgment. The court held that these facts did not show waiver or estoppel. We quote from the opinion: "The mere pendency of negotiations, or the fact that occasional interviews occurred between the parties in regard to an adjustment or settlement of the claim, can have no such effect, unless there was something said or done which was either designed or fairly calculated to induce in the mind of the plaintiff the reasonable belief, on sufficient grounds, not merely that a settlement might be effected, but that the insurer intended to waive the benefit of the provision."¹⁰²

¹⁰¹ 6 W. Va. 425.

¹⁰² *Gooden v. Insurance Co.*, 20 N. H. 73; *Cook v. Insurance Co.*, 70 Mo. 610; *Colonus v. Insurance Co.*, 3 Mo. App. 56; *Murphy v. Insurance Co.*, 7 Allen (Mass.) 239.

In *Suggs v. Travelers' Ins. Co.*¹⁰³ it was held that the stipulation limiting the time within which suit must be brought is valid, and will be enforced by the courts; that there can be no exception in favor of minors, even, who are beneficiaries of the policy.

In *Ames v. New York Union Ins. Co.*¹⁰⁴ it was held that the company had waived its right to insist upon the enforcement of the stipulation limiting the time within which suit could be brought. We find a statement of the case in the syllabus, from which we quote: "The policy provided that the loss was to be paid within ninety days after proofs should be completed and filed, and that an action should be barred unless commenced within six months after loss occurred. The fire was on July 5th, and the proofs were served on the 14th of that month. A defect was pointed out by the company on October 3d, which was received by the plaintiff on the 14th of that month. The secretary of the company, when applied to for payment, stated that it would not be due until January 14th, when it would be made. The action was commenced January 18th." The promise of the secretary to pay the loss on the 14th of January, six months and nine days after the loss, was clearly a waiver of the policy condition requiring suit to be brought within the time mentioned.¹⁰⁵

This same doctrine is discussed in *Killips v. Putnam Fire Ins. Co.*¹⁰⁶ The syllabus of the case contains a concise statement of the point: "A clause in the policy limiting the right of action thereon to twelve months after the loss was valid, but the stipulation might be modified or waived by the parties, or the company might be estopped by its own acts from claiming the benefit thereof. Where, by any act or omission of the responsible officers and agents of the company, the assured is induced to suspend for a certain length of time the performance of acts required on his part after a loss, such time should not be reckoned as a part of the period to which the right of action is limited."

Lyon, J., said: "Provisions limiting the right of action of insurance to much shorter periods than is prescribed by the statute laws of the country for the commencement of similar cases are almost

¹⁰³ 71 Tex. 579, 9 S. W. 676.

¹⁰⁴ 14 N. Y. 260.

¹⁰⁵ *Curtis v. Insurance Co.*, 1 Biss. 485, Fed. Cas. No. 3,503.

¹⁰⁶ 28 Wis. 472.

universally inserted in such policies, and the binding force of these provisions upon the parties has been as universally recognized by the courts, but such contract of limitation in any given case, like all other stipulations and covenants, may be modified, waived, or extended by the parties thereto, or the party in whose favor the limitation is imposed may be estopped by his own act or omission from claiming the benefit of it. * * * It does not seem to require much argument to demonstrate that if, by any act or omission of the responsible officers and agents of the defendant, the plaintiff should be induced to suspend action in the premises for a given time, such time should not be deemed a part of the twelve months to which his right of action is limited by the original contract."

The reasoning of the learned court in this case is based on the questionable proposition that the time within which suit can be brought does not begin to run until the loss is actually due and payable. If the suit must be commenced within a specified time from the date of the fire, it cannot be material whether the insured has or has not delayed making his proofs of loss by reason of anything which the company has done or omitted to do, unless such acts or omissions should amount to fraud. To construe the words "when the loss occurs" to mean "when the loss is payable," is straining them almost to a perversion of language, and can hardly be justified on the ground that it is done to prevent a forfeiture or save a remedy. The frequent use of the word "loss" in the insurance contract should leave no doubt as to its meaning. It always refers to one event,—the fire. It is a provision common to all insurance policies that "when a loss occurs" the assured shall forthwith give notice of the fact to the company, and as soon thereafter as possible render a particular account, etc. Is there anything in the language here used for the courts to construe? Can there be any doubt in the mind of any intelligent person whether the words "loss occurs" refer to the burning of the property or the payment of the claim?

§ 410. When Suit is Commenced within the Term, Afterwards Dismissed, and Another Suit Brought after the Expiration of the Term, the Last Suit will be Barred.

Where suit is commenced within the time provided in the policy, and afterwards discontinued for any reason, and a second suit brought after the expiration of the time, the bringing of the first suit within the term will not save the second one from being barred.¹⁰⁷ This has been held in several well-considered cases. Among those most recent is that of *Howard Ins. Co. v. Hocking*.¹⁰⁸ The court said: "The validity of the special agreement as to the time of bringing an action on the policy is conceded. * * * The very object and spirit of the agreement is to exclude the operation of the statute, which would otherwise govern, and in the present case the exclusion is so clear and express that nothing short of an entire disregard of the language used can escape it. 'It is hereby expressly provided that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery * * * unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.' The words are not that 'no first action' shall be sustainable, but 'no action.' In *Wilson v. Aetna Ins. Co.*,¹⁰⁹ Chief Justice Redfield says: 'This stipulation * * * is that no recovery shall be had unless such action shall be commenced,' etc. 'Such action can only signify the action in which the recovery is sought. That must be the action, and all actions in which recovery is claimed, and there is no provision for any exception on account of the failure of any such ac-

¹⁰⁷ *Wilson v. Insurance Co.*, 27 Vt. 99; *Riddlesbarger v. Insurance Co.*, 7 Wall. 386; *McFarland v. Insurance Co.*, 6 W. Va. 437; *McIntyre v. Insurance Co.*, 52 Mich. 188, 17 N. W. 781, and 13 Ins. Law J. 216; *State Ins. Co. of Des Moines v. Stoffels*, 29 Pac. 479, 48 Kan. 205.

¹⁰⁸ 130 Pa. St. 170, 18 Atl. 614.

¹⁰⁹ 27 Vt. 99.

tions. * * * Statutes of limitation would be subject to no such exception, unless by the express terms of the statute. That a party was driven to a nonsuit in his former suit is no excuse for not bringing a suit before the cause of action is barred by statute, or by the terms of the contract, unless such an exception is contained in the act of limitation.' *Riddlesbarger v. Hartford Ins. Co.*¹¹⁰ is a case fully in support of the proposition. There the statute of limitations of Missouri provided that if, in any action commenced within the statutory period, the plaintiff should suffer a nonsuit, he might commence a new action within one year; but the supreme court of the United States held that this provision did not prevent the bar of the agreement. 'The rights of the parties,' says Field, J., 'flow from the contract that relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also.' To the same effect are *Wilkinson v. First Nat. Fire Ins. Co. of Worcester* and *Arthur v. Homestead Fire Ins. Co.*¹¹¹ It being admitted that the present action was not brought within the stipulated twelve months, it is incumbent on plaintiff to show some escape from the agreed limitation. Two grounds have been argued with much ingenuity, both depending upon a former action between the same parties. That action was brought within sixty days of the furnishing of proofs of loss and was, therefore, held by this court to be premature.¹¹² It is now argued that the issue upon which that action was finally decided against plaintiff was not raised in the pleadings when it should have been, so as to afford plaintiff an opportunity to discontinue, and bring a new suit after the sixty days, and still within the stipulated twelve months, but was held back by the defendant until the trial after the twelve months had elapsed, and, therefore, that the limitation should be treated as waived. It is undoubtedly true that any act which tends to mislead the plaintiff, while parties are dealing on friendly terms, to avoid litigation, will be held to be evidence of a waiver of such limitation as the present, but, after suit has been brought, and the parties are dealing at arm's length, the rule does not apply with the same strictness, and much more positive evidence of actual misleading, if not of intent to mislead, is necessary to prove a waiver or estoppel."

¹¹⁰ 7 Wall. 386.

¹¹¹ 72 N. Y. 499; 78 N. Y. 462.

¹¹² *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 415, 8 Atl. 589.

§ 411. Different Rule Followed in Ohio.

Nowhere do I find, except in Ohio, that the courts have construed the limitation clause as referring to other suits than those that were continued to judgment. In *Fellowes v. Madison Ins. Co.*¹¹³ a different rule is followed, and the court intimates that when a suit is brought within the time required, and dismissed, a subsequent suit, if promptly commenced in good faith, will not be barred. Statutory regulations, relating to the time when an action will be barred, do not generally have the effect to prevent parties from contracting for a different time, or from establishing rules that shall be for their greater personal convenience. Section 3742 of McClain's Iowa Code provides that, if suit is brought, and for any reason, except negligence, is dismissed, and another action commenced for the same cause, the latter may be considered as a continuation of the former. It was held that the rights of parties in an insurance case were not affected by this statute; that their rights flowed from the contract, and not from the law.¹¹⁴

§ 412. Separate Interests cannot be Joined in Same Suit.

Where policy was written to A. and B., covering on their separate property, and another policy to A. and C., covering on property in which they were jointly interested, it was held that the several parties could not recover in a single action. The court said: "It is one of the prerequisites to the uniting of different causes of action that all the causes of action must affect all the parties to the action, plaintiffs as well as defendants. * * * Two or more persons having separate causes of action against the same defendant, though arising out of the same transaction, cannot unite, nor can several plaintiffs in one complaint demand several distinct matters of relief, nor can they enforce joint and separate demands against the same defendants."¹¹⁵

¹¹³ 2 Disn. (Ohio) 128.

¹¹⁴ *Harrison v. Insurance Co.*, 67 Fed. 298.

¹¹⁵ *State Ins. Co. of Des Moines, Iowa, v. Belford*, 2 Kan. App. 280, 42 Pac. 409.

§ 413. When the Insurer Keeps Itself Inaccessible to Service of Summons, the Insured will be Excused from Bringing Suit within the Time Stipulated.

In *Peoria Marine & Fire Ins. Co. v. Hall*¹¹⁶ the summons was issued and placed in the hands of the sheriff for service 13 days before the expiration of the 12-months limitation, but the officer, finding no person within his bailiwick on whom service could be made, returned the summons under the forms of law, and another summons was issued, and service secured, but not until after the year had expired. The last summons was indorsed by the clerk of the court as an "alias." The court intimated a doubt whether such indorsement was sufficient to give to the last summons the legal effect of continuing the first. It held, however, that the inaccessibility of the defendant for the purpose of service excused the plaintiff for his failure to commence suit within the stipulated time. We quote from the opinion: "The fundamental idea, the tacit condition upon which such a limitation must rest, and without which it could not be tolerated for a moment, is that the defendant should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close, to enable the plaintiff to commence suit against him by the service of process in the ordinary, legal mode; otherwise the defendant would be enabled to take advantage of his own wrong, and, by absenting himself entirely, to defeat the plaintiff's right of action."

In Illinois it has been held that suit is commenced when the *præcipe* is filed.¹¹⁷

§ 414. What will not Excuse Failure to Bring Suit within Time Stipulated.

The defense that the insured has been arrested and prosecuted for arson will not excuse a failure to bring suit on the policy within the time prescribed, unless the arrest and prosecution are at the

¹¹⁶ 12 Mich. 202, 4 Benn. Fire Ins. Cas. 737.

¹¹⁷ *Schröder v. Insurance Co.*, 104 Ill. 71, 12 Ins. Law J. 9.

instigation of the insurer.¹¹⁸ Even then delay will not be excused, unless it appears that the insured was for a long time detained from his business, or his time so much occupied with the criminal proceedings as to prevent his bringing suit within the term of the limitation. Negotiations for settlement, had in good faith, although continued until near the expiration of the time within which suit may be commenced, will not be construed as a waiver of the bar or to extend its limits.

In *Blanks v. Hibernia Ins. Co.*¹¹⁹ the negotiations continued until within two months of the expiration of the time, and the court held that the insured was not excused.¹²⁰

Where the policy provides that the loss shall be payable 60 days after satisfactory proofs have been furnished, and that no action can be maintained unless commenced within 12 months next after any loss or damage shall occur, it is held that the time begins to run from the day of the fire, and not 60 days after filing proofs. Concerning this point it may be said, however, that the courts have differed widely, as recent cases will show.¹²¹

Although an injunction is granted restraining the insurer from paying the loss and the insured from receiving it, the latter will not be justified in withholding suit beyond the period prescribed in the

¹¹⁸ *Edson v. Insurance Co.*, 35 La. Ann. 353.

¹¹⁹ 36 La. Ann. 599.

¹²⁰ *Allemania Ins. Co. v. Little*, 20 Ill. App. 431; *Phoenix Ins. Co. v. Lebecher*, Id. 450.

¹²¹ *Chambers v. Insurance Co.*, 51 Conn. 17; *Humboldt Ins. Co. v. Johnson*, 1 Ill. App. 309, affirming 91 Ill. 92; *Underwriters' Agency v. Sutherland*, 55 Ga. 266; *Oakland Home Ins. Co. v. Allen*, 1 Kan. App. 108, 40 Pac. 928; *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099. See, also, *Hart v. Insurance Co.*, 86 Wis. 77, 56 N. W. 332; *Egan v. Insurance Co. (Or.)* 42 Pac. 990. Contra, *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Hay v. Insurance Co.*, 77 N. Y. 235; *Mix v. Insurance Co.*, 9 Hun. 397; *Ellis v. Insurance Co.*, 64 Iowa, 507, 20 N. W. 782; *Chandler v. Insurance Co.*, 21 Minn. 85; *Barber v. Insurance Co.*, 16 W. Va. 658.

"Loss or damage occurs" construed to mean "when the fire occurs," not "when loss is due and payable." *Johnson v. Insurance Co.*, 91 Ill. 92; *Fullam v. Insurance Co.*, 7 Gray (Mass.) 61; *Blair v. Insurance Co.*, 7 Russ. & G. 372; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. D. 151, 45 N. W. 703, and 19 Ins. Law J. 636; *King v. Insurance Co.*, 47 Hun. 1; *Bradley v. Insurance Co.*, 28 Mo. App. 7; *State Ins. Co. v. Meesman*, 2 Wash. 459, 27 Pac. 77; *Grigsby v. Insurance Co.*, 40 Mo. App. 276.

policy. The proceedings to enjoin do not prevent the insured from bringing his action.¹²² But there are good authorities supporting the proposition that a garnishee process will extend the time for bringing suit on the policy.¹²³

When it is expressed in the policy that the agent has no power to waive any of its conditions, any representations or promises made by the agent in regard to the intentions of the company, causing the insured to delay or forbear bringing suit within the prescribed time, will not change the rights of the parties. When the insured relies on the statements or promises of an agent not acting within the scope of his authority, of which the insured has notice, he does so at his peril.¹²⁴

It cannot be said that an action has been commenced within the meaning of the policy, unless the court in which the proceedings are instituted has jurisdiction.¹²⁵

In *Universal Mut. Fire Ins. Co. v. Weiss*¹²⁶ it was held that the provision requiring suit to be brought within a specified time was an independent, precedent condition, and not affected by such acts of the insurer as would create a waiver as to other conditions of the policy. On a careful consideration of this affirmation of a general proposition, we find no valid reason for withholding assent. The condition stands alone, and has no relation to the performance of other stipulations in the policy in respect to matters either before or after a loss.

In *Thompson v. Phoenix Ins. Co.*¹²⁷ the policy contained a clause, as follows: "It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be maintainable in any court of law or chancery until after an award shall be obtained,

¹²² *Wilkinson v. Insurance Co.*, 72 N. Y. 499, 9 Hun, 522; *Schroeder v. Insurance Co.*, 2 Phila. 286.

¹²³ *Harris v. Insurance Co.*, 35 Conn. 310; *Ritter v. Insurance Co.*, 28 Mo. App. 140.

¹²⁴ *Waynesboro Mut. Fire Ins. Co. v. Conover*, 98 Pa. St. 384; *Underwriters' Agency v. Sutherland*, 55 Ga. 266. Contra, *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016; *German Fire Ins. Co. v. Carrow*, 21 Ill. App. 631; *Little v. Insurance Co.*, 123 Mass. 380.

¹²⁵ *Keystone Mut. Ben. Ass'n v. Norris*, 115 Pa. St. 446, 8 Atl. 638.

¹²⁶ 106 Pa. St. 20.

¹²⁷ 25 Fed. 296, 15 Ins. Law J. 66.

fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months after the date of the fire from which such loss shall occur; and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim." The court said: "The stipulation for limitation in this policy is, considered by itself, plain, and susceptible of but one meaning; and, putting aside the provision concerning an award as inapplicable in this instance, there is nothing in the policy to qualify or render it doubtful. * * * The limitation in this case is a year from a day certain, to wit, the day of the fire, and, unless the assured is prevented, by the action or nonaction of the company in the matter of ascertaining the amount of the loss, from commencing an action within that time, he must do so, or be barred therefrom."

§ 415. Conclusions.

The declaration should set forth the insurance, payment of premium, interest in the property insured, loss, in what manner it occurred, performance of the conditions, or that which excuses performance, and that proofs of loss have been furnished more than 60 days before the commencement of suit. The policy and application (when application is referred to and made part of the policy) should be set out *hæc verba*, or in substance.

It will not be sufficient for the answer to express only a general denial. The defense may arise from default in performance of some one or more of the conditions; and, performance having been pleaded, denial would theoretically bring into issue the defense relied upon. But the uniform practice of the courts requires that all matters of defense under the terms of the contract shall be specially pleaded.

When served with garnishee process, if all the parties are within the jurisdiction of the court, and the principal defendant appears, the garnishee has only to answer in accordance with the facts, and await the order of the court. If, however, the principal defendant is a nonresident, and no personal service has been obtained, the garnishee can often best protect himself by pleading to the jurisdiction of the court.

If the property burned was a homestead, or for other reasons exempt from execution, the fact should be pleaded by the garnishee, if the principal defendant does not appear and answer for himself.

The insurance company, by reason of garnishee proceedings, will not lose its right to rebuild or replace the property burned; and until it has exercised its option, or the time has expired within which it may exercise such option, the liability to make payment in money is only contingent, and not subject to garnishment.

The law of the place where the contract is made, and not the place where it is to be performed, will generally control. The rule uniformly followed by the courts is, when the contract has a personal character, its validity and construction will depend upon the law of the place where it is made; but when the contract refers to interests in real property it will be construed and enforced according to the local laws of the place where the property is situated.

It has always been the policy of the law to fix limitations to man's neglectful tendencies. Sloth and forgetfulness are infirmities of mind that lead to more complications, in respect to the assertion of personal rights, than any one other cause; and laws have been established fixing a limit beyond which the courts will not aid those who demand recognition of rights from one another. But it has not been the purpose of the law to prevent parties from regulating their own affairs by contract in a manner best suited to their interest or convenience, and when, therefore, the limitations established by the statute differ from the agreements of the parties concerned, the contract regulation will control.

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